UNITED
NATIONS

CAT

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.
GENERAL

CAT/C/28/Add.5
9 February 2000

Original: ENGLISH

COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Initial reports of States parties due in 1995

Addendum

UNITED STATES OF AMERICA*

[15 October 1999]

* The list of Annexes.

GE.00-40656 (E)

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I. United States reservations, understandings and declarations and Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment

II. Relevant constitutional and legislative provisions

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* The annexes are available for consultation in the archives of the secretariat.

Introduction

1. The Government of the United States of America welcomes the opportunity to report to the Committee against Torture on measures giving effect to its undertakings under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in accordance with article 19 thereof. The organization of this initial report follows the revised General Guidelines of the Committee against Torture regarding the form and content of initial reports to be submitted by States parties (CAT/C/4/Rev.2).

2. This report has been prepared by the U.S. Department of State with extensive assistance from the Department of Justice and other relevant departments and agencies of the Federal Government. Substantial contributions were also solicited and received from interested non-governmental organizations, academics and private citizens. The report covers the situation in the United States and the measures taken to give effect to the Convention through September 1999.

3. The United States ratified the Convention against Torture in October 1994, and the Convention entered into force for the United States on 20 November 1994. In its instrument of ratification (deposited with the Secretary General of the United Nations on 21 October 1994), the United States made a declaration pursuant to article 21, paragraph 1, recognizing the competence of the Committee against Torture, on a reciprocal basis, to receive and consider a State party's claims that another State party is not fulfilling its obligations under the Convention. The United States also conditioned its ratification on two reservations and a number of interpretive understandings; these are included at annex I and discussed at the relevant portions of this report.

4. In 1992 the United States became a party to the International Covenant on Civil and Political Rights, some provisions of which may be considered to have wider application than those of the Convention against Torture. The initial United States report under the Covenant, which provides general information related to United States compliance with and implementation of obligations under the Covenant, was submitted to the Human Rights Committee in July 1994 (see HRI/CORE/1/Add.49 and CCPR/C/81/Add.4). The United States also ratified the International Convention on the Elimination of All Forms of Racial Discrimination at the same time as it ratified the Convention against Torture. In February 1995 the United States signed the Convention on the Rights of the Child.

5. The United States has long been a vigorous supporter of the international fight against torture. United States representatives participated actively in the formulation of the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in 1975, and in the negotiation of the Convention against Torture. The United States continues to be the largest donor to the United Nations Voluntary Fund For Victims of Torture, having contributed over $12.6 million as of August 1999. The United States Government pursues allegations of torture by other governments as an integral part of its overall human rights policy, highlighting such issues in its annual Country Reports on Human Rights Conditions.

6. Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the

Convention constitutes a criminal offence under the law of the United States. No official of the Government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a "state of public emergency") or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension. The United States is committed to the full and effective implementation of its obligations under the Convention throughout its territory.

7. No Government, however, can claim a perfect record in each of the areas and obligations covered by the Convention. Abuses occur despite the best precautions and the strictest prohibitions. Within the United States, as indicated in this report, there continue to be areas of concern, contention and criticism. These include instances of police abuse, excessive use of force and even brutality, and death of prisoners in custody. Overcrowding in the prison system, physical and sexual abuse of inmates, and lack of adequate training and oversight for police and prison guards are also cause for concern. The national conscience was sharply challenged in 1991 by the widely publicized beating of Rodney King by four officers of the Los Angeles Police Department and by their subsequent prosecution by state and federal authorities. More recently, a Haitian immigrant, Abner Louima, was brutalized by New York City policemen after being taken into custody. Concerns about the excessive use of force by federal agents arose from widely publicized incidents in 1992 at Ruby Ridge, Idaho, and in 1993 in Waco, Texas; similar charges were levelled against the Philadelphia Police Department in connection with the May 1985 bombing of the headquarters of the radical African-American organization MOVE.

8. As a result of these and other instances, American society has renewed its efforts to ensure that appropriate guidelines on the use of force are respected and that the prohibitions against torture and other forms of physical, mental and psychological abuse by law enforcement and correctional officials are observed in practice. Indeed, in 1994 the United States Congress enacted important legislation which authorizes the Attorney-General to institute civil lawsuits to obtain remedies for patterns or practices of misconduct by law enforcement agencies and agencies responsible for the incarceration of juveniles. The Department of Justice is actively enforcing this statute, as well as older laws that permit criminal prosecution of law enforcement and correctional officers who wilfully deprive individuals of their constitutional rights, and statutes that enable the Department of Justice to obtain civil relief for abusive conditions in state prisons and local jails.

9. In addition, in the United States, some have voiced concerns related to other areas covered by or related to the Convention, such as non-consensual scientific and medical experimentation, treatment of the mentally ill and illegal immigrants in custody, and imposition of capital punishment. These and other issues are discussed in connection with article 16.

10. Every unit of Government at every level within the United States is committed, by law as well as by policy, to the protection of the individual's life, liberty and physical integrity. Each must also ensure the prompt and thorough investigation of incidents when allegations of mistreatment and abuse are made, and the punishment of those who are found to have committed

violations. Accomplishment of necessary reforms and improvements is a continued goal of government at all levels. The United States intends to use its commitments and obligations under the Convention to motivate and facilitate a continual review of the relevant policies, practices, and institutions in order to assure compliance with the treaty.

I. GENERAL INFORMATION

11. Torture does not occur in the United States except in aberrational situations and never as a matter of policy. When it does, it constitutes a serious criminal offence, subjecting the perpetrators to prosecution and entitling the victims to various remedies, including rehabilitation and compensation. Although there is no federal law criminalizing torture per se, any act falling within the Convention's definition of torture is clearly illegal and prosecutable everywhere in the country, for example as an assault or battery, murder or manslaughter, kidnapping or abduction, false arrest or imprisonment, sexual abuse, or violation of civil rights.

A. Constitutional and legal framework

12. The United States of America is a federal republic of 50 states, together with a number of commonwealths, territories and possessions. The United States Constitution, including its various amendments, is the central instrument of government and the supreme law of the land. It establishes a representative system of democratic governance at the federal level and guarantees a republican system at the state and local levels.

13. The Federal Government consists of three separate branches: the Executive (the President and the various executive departments and agencies), the Legislative (the United States Congress, consisting of the Senate and the House of Representatives) and the Judiciary (an independent three-tiered system of courts headed by the U.S. Supreme Court). In the federal system, laws are enacted by the Congress, enforced by the Executive Branch through its various departments and agencies, and interpreted and applied by the judiciary.

14. Under the United States Constitution, the Federal Government is a government of limited authority and responsibility. Those powers not delegated to the Federal Government are specifically reserved to the states and the people. The resulting division of authority means that state and local governments retain significant responsibility in many areas. This allocation of governmental responsibility has particular relevance to certain aspects of the implementation of the Convention against Torture. For example, although there is a continually evolving and expanding body of federal criminal law and procedure, criminal law is still largely a matter of state competence, and the precise nomenclature, rules, procedures and punishments vary from state to state. However, in all states, as well as at the federal level and in the commonwealths and territories, criminal law and procedure must meet the minimum standards provided by the United States Constitution. All individuals, regardless of nationality or citizenship, are entitled to constitutional protection.

15. Each of the 50 constituent states has its own constitution as well, and the state governmental structures closely parallel that of the Federal Government with separate executive, legislative and judicial branches. Essentially, each state is a sovereign entity, inherently free to promulgate and enforce laws and policies that pertain exclusively to that state. State authority is

limited under the federal Constitution only to the extent that the relevant authority has been delegated to (or "pre-empted" by) the Federal Government. Thus, in addition to the adoption and enforcement of general criminal law, the power of state government extends to nearly all aspects of the regulation of matters internal to the state, such as the establishment and maintenance of state courts, prisons and correctional institutions; the regulation of industries, businesses, professions, and commerce; educational institutions; regulation of property; and so forth.

16. Each state consists in turn of many subordinate governmental entities, including counties (or parishes), various forms of municipal jurisdictions (cities, towns, townships, villages, boroughs, etc.), and other types of governmental units (such as water, school, housing and fire districts). In some instances, state and local governments have created regional authorities, for such purposes as economic development or resource management. Nationwide there are some 87,000 local governmental units, including approximately 3,000 counties, 3,500 towns and municipalities, and 15,000 school districts. Nine cities have populations in excess of 1 million persons; over 65 cities exceed 250,000 persons. Many of these subordinate units exercise, in one fashion or another, a measure of the regulatory or "police power" of the state, including in its criminal, enforcement or custodial dimensions.

17. The same is true of other governmental levels which exist independently of the constituent states: the District of Columbia (seat of the Federal Government); the commonwealths of Puerto Rico and the Northern Mariana Islands; and the unincorporated territories of American Samoa, the United States Virgin Islands, and Guam. While the specific governmental arrangements differ, in each case duly constituted local authorities in fact exercise criminal law enforcement authority and jurisdiction on a local basis.

18. This complicated federal structure both decentralizes police and other governmental authority and constrains the ability of the Federal Government to affect the law of the constituent jurisdictions directly. Although torture and cruel, unusual or inhuman treatment or punishment are prohibited in every jurisdiction, not every instance in which such acts might occur is directly subject to federal control or responsibility.

19. For this reason it was considered necessary to condition United States ratification of the Convention against Torture upon an understanding reflecting the respective competencies of the various governmental units in regard to certain provisions of the Convention. The understanding (full text at annex I) states that United States obligations under the Convention shall be implemented by the Federal Government to the extent of its legislative and judicial jurisdiction, and otherwise by the state and local governments. With respect to those provisions which most significantly implicate state and local authority (arts. 10-14 and 16), the Federal Government expressly committed itself to taking measures "appropriate to the Federal system" so that, in turn, the competent authorities of the constituent units "may take appropriate measures for the fulfilment of the Convention". The intent was to make clear that steps by the Federal Government that are necessary to effect compliance at the state and local level will be consistent with the federal structure of the domestic governmental arrangements.

20. It is important to emphasize that the "federalism" understanding does not detract from or limit the substantive obligations of the United States under the Convention, nor does it exempt any state or local officials from the Convention's requirements regarding the prohibition,

prevention and punishment of torture or cruel, inhuman or degrading treatment or punishment. It is also important to recognize that the fundamental constitutional protections, including in particular the prohibition against cruel and unusual punishment, operate as restrictions at all levels of the government; all persons in the United States, regardless of their status, receive constitutional protection, in particular the protection against cruel and unusual punishment.

21. In the United States, the rights of individuals, including those of detainees and convicted inmates, are protected by the rule of law. Government officials generally respect and act in accord with the relevant standards. When they do not, an independent judiciary can enforce those rules against them. In the following discussion, this is reflected through frequent citation to judicial decisions as well as statutes.

B. United States criminal justice system

22. The enactment and enforcement of criminal law remains primarily a function of state and local governments in the United States. In fact, the emphasis in the United States has traditionally been on local law enforcement. Despite a growing body of federal law and an expanded role for federal law enforcement agencies (especially the Federal Bureau of Investigation or "FBI"), the majority of offences proscribed by law, the vast preponderance of crimes committed, and the overwhelming bulk of criminal prosecutions in the United States remain matters of state and local law and institutions. Local control helps to ensure that the criminal justice system is (and is perceived to be) responsive to the concerns of the affected population; it also permits states and localities to experiment with new approaches to criminal justice issues. Local experiences have proven to be one of the great strengths of the United States system; at the same time, the United States Constitution and federal laws (including treaties) provide clear and effective constraints throughout the country, so that local experimentation does not infringe fundamental rights. These factors also add rich diversity and complexity to the United States criminal justice system.

23. Federal. At the federal level, the only crimes which the United States Congress is expressly authorized by the Constitution to punish are piracies, felonies on the high seas, offences against the law of nations, treason, and counterfeiting of the securities and current coin of the United States (art. I, sec. 8, cl. 10; art. I, sec. 8, cl. 5 and 6; art. III, sec. 6). Nonetheless it has long been recognized that criminal legislation may be based in the Commerce Clause, art. I, sec. 8, cl. 3, and that Congress has inherent power to create, define and punish other crimes whenever necessary to carrying out the responsibilities of Government (art. I, sec. 8., cl. 18). See, e.g., Brooks v. United States, 267 United States 432 (1925); United States v. Fox, 95 U. S. 670 (1878).

24. Those crimes are set forth primarily in Part I of Title 18 of the United States Code. They define as federal offences a range of illegal acts which pertain to functions uniquely within the purview of the Federal Government (e.g., counterfeiting and forgery, customs, espionage, mail or wire fraud, passports and visas), which occur on or against federal property or against federal officials or employees in the conduct of their official duties (e.g., bribery, graft, fraud, obstruction of justice, assault, killing), or which are of special federal concern (e.g., aircraft hijacking and sabotage, firearms and explosives, gambling, terrorism, piracy, kidnapping, sexual exploitation of children). Some federal crimes are specified elsewhere in the United States Code

(e.g., those concerning food and drug offences, monetary transactions, offences under the Internal Revenue Code). The rules governing criminal procedure at the federal level are also set forth in Title 18 as well as Title 28 and in the Federal Rules of Criminal Procedure. A separate chapter of Title 18 governs international extradition.

25. Criminal law enforcement and crime prevention programmes at the federal level are primarily the responsibility of the Attorney-General of the United States and the U.S. Department of Justice, which she directs. The Attorney-General is also responsible for coordination and implementation of the Federal Government's sizeable programmes of assistance to state and local law enforcement authorities.

26. There is no single national police force and no law enforcement agency with universal jurisdiction in the United States. Some 50 separate law enforcement agencies exist at the federal level, employing approximately 69,000 officers or special agents authorized to carry firearms and make arrests. The United States Government's principal criminal investigative agency is the FBI. Its jurisdiction extends to all violations of federal law except those specifically assigned to another federal agency. Several other investigative and law enforcement agencies are also found within the Department of Justice, including the Drug Enforcement Administration, the U.S. Marshals Service, the Federal Bureau of Prisons, and (within the Immigration and Naturalization Service) the Border Patrol. Within the Treasury Department are the Secret Service, the Bureau of Alcohol, Tobacco and Firearms, the Customs Service, and the enforcement arm of the Internal Revenue Service. The Department of the Interior oversees the National Park Service, including the U.S. Park Police, and the enforcement officers of the Fish and Wildlife Service. Law enforcement powers are also exercised by the Federal Protective Service (within the General Services Administration), the Postal Inspection Services, the U.S. Capitol Police and the Diplomatic Security Service of the U.S. Department of State among others. In addition, each of the military departments has criminal investigation organizations.

27. Criminal prosecutions under federal law are generally initiated and directed by the offices of the 93 United States Attorneys, which function as the regional representatives of the Justice Department throughout the country. In some cases, the responsibility may be exercised by officials from the Criminal or other Divisions of the main Justice Department in Washington, D.C.

28. Criminal cases are tried before the 94 federal courts of original jurisdiction (called U.S. District Courts) pursuant to federal rules of evidence and criminal procedure. The right to a jury trial in all criminal prosecutions is guaranteed by the Sixth Amendment to the United States Constitution. Imposition of sentence upon those found guilty is a function of the courts. The U.S. Marshals Service is responsible for providing support and protection to the federal courts, including the protection, custody and transport of federal prisoners and the apprehension of federal fugitives.

29. Individuals convicted of federal crimes are sentenced to the custody of the United States Attorney-General. The Federal Bureau of Prisons, which exercises responsibility over these convicted persons, operates 94 correctional facilities throughout the nation, including 10 penitentiaries, 54 correctional institutions, and 15 prison camps. Where individual prisoners

are placed depends upon the severity of their offences, their criminal history, and any special needs or requirements. As of July 1999, approximately 117,331 adults were incarcerated in Federal Bureau of Prison facilities.

30. Federal prisoners may also be sentenced directly to privately-owned community corrections centres, also known as "half-way houses". These facilities are usually owned and administered by private, non-profit service organizations (such as the Salvation Army, religious organizations, etc.) under contract to the Department of Justice. Such facilities are administered by professional staff and are monitored by the Federal Bureau of Prisons, which provides training and inspects the facilities to ensure compliance with federal regulations.

31. The U.S. Parole Commission is responsible for the granting, denial and revocation of parole for federal offenders. The Office of the Pardon Attorney, in consultation with the Attorney-General, assists the President in exercising his authority to grant executive clemency in accordance with article 2, section 2 of the United States Constitution. Federal prisoners whose crimes were committed after November 1987 must by law serve at least 85 per cent of their sentences (except that federal life sentences must be served in full).

32. Each of the commonwealths and territories, as well as the District of Columbia, employs its own law enforcement (police and investigative) forces. Criminal jurisdiction is vested in an appropriate federal District Court, except in the District of Columbia, which operates its own criminal justice system for minor offences (more serious offences - felonies - are tried in the U.S. District Court).

33. State and local. The 50 constituent states of the Union retain broad authority to regulate public health, safety, morals and welfare within their respective jurisdictions, including through the exercise of criminal law. Unlike the Federal Government, they need not base the exercise of such authority in a specific provision of the federal Constitution but derive their powers from their own constitutions and statutes. All must nonetheless comply with the relevant rights and protections accorded individuals under the United States Constitution.

34. Enforcement of state law is the responsibility of the state Attorney-General under the direction of the Governor. Most criminal prosecutions, however, are in fact initiated and pursued by public prosecutors at the county or municipal level, in state or local courts. Prosecutors may be elected or appointed, depending on local practice. At all levels, prosecutors in the United States enjoy a high degree of independence in the discharge of their responsibilities.

35. While each state (except Hawaii) maintains some form of state-wide law enforcement body (the majority denominated as highway patrol agencies, others as "state police"), these authorities in fact exercise relatively limited jurisdiction. Virtually all of the 3,000 or so county governments have their own independent police forces, typically directed by an elected sheriff. There are also thousands of separate city, town and other local law enforcement agencies; nearly three quarters of the 650,000 full-time police employees in the United States work for municipal police agencies. All told, some 15,000 separate city, county and state law enforcement agencies exist in the United States. Most local police departments are small; over 90 per cent employ fewer than 50 sworn officers, and approximately half have fewer than 10.

36. None of these law enforcement agencies operates in precisely the same manner. They perform a variety of functions, from crime prevention and investigation to arrest and detention of suspects, custodial and correctional duties for convicted offenders, to probation, parole and pardon. The large number of institutions, personnel, governmental units and other structures involved in the United States criminal justice system makes it difficult to assure that all correctional and police officers and staff are given similar training, for example in the area of human rights. However, the availability of the courts and the large number of lawyers throughout the United States help to assure some degree of consistency in protecting human rights at all levels.

37. Prosecution of state and local crimes generally takes place before a state court of general jurisdiction. In some states, a separate system of criminal appeals exists. Some cities operate separate criminal courts. In every case, convicted offenders enjoy a right to seek review by the highest state court; in many cases, there also exists a right to seek a discretionary grant of review from the U.S. Supreme Court. In certain circumstances, state and local criminal cases may also be taken before federal courts through a writ of habeas corpus. In all cases, however, individuals have access to federal courts to vindicate their rights under the United States Constitution. Most states have parole boards to decide whether and when a prisoner may be released before the expiration of his or her sentence (e.g., taking account of good behaviour and special achievements). On the average, state prisoners serve approximately 41 per cent of their sentences.

38. State prisons are normally operated by state correctional agencies, reporting to the state Governor or Attorney-General. In some cases they are part of the health and human services division or the law enforcement division of the state government. Nationally, there are some 1,375 state-operated penal institutions (including prisons, prison hospitals, half-way houses, and work release centres).

39. At the regional, county and local levels, jails and other short-term detention centres are supervised by the county or local governments where they are located. These facilities (approximately 3,300 nationally) are generally used to confine persons upon arrest, pending arraignment and trial, conviction and sentencing. Most are small; according to a 1988 survey, two thirds of the local jails had daily populations of fewer than 50 inmates. County jails, as well as county governments, are ultimately responsible to their respective state governments. In six states the jail and prison systems are combined. In some large metropolitan areas, municipal or city governments may also exercise correctional authority, subject to state and federal law. Many states have systems of jail inspections to ensure that these local facilities are operated in conformity with state standards. Some jurisdictions have undertaken "privatization" of prisons, subject to state supervision and control.

40. The American Correctional Association, a private non-profit organization, administers a voluntary accreditation scheme for prisons in the United States and Canada based on standards considered essential to good correctional management. The Federal Bureau of Prisons voluntarily complies with these standards.

41. Military. The Congress of the United States established a separate system of military justice for members of the United States armed forces. Service members on active duty are

subject to the Uniform Code of Military Justice (UCMJ), a comprehensive criminal code and set of procedures established in 1950 and found in Title 10 of the United States Code. Cases of alleged criminal conduct covered by the UCMJ are investigated and, when substantiated, resolved in an appropriate manner, ranging from non-judicial punishment to one of three types of courts martial (summary, special or general). Military jurisdiction over the criminal conduct of its members extends to acts committed on or off the military installation, regardless of whether the member is on or off duty, and regardless of where in the world the offence takes place. With respect to their non-military activities, active duty service members are subject to ordinary United States criminal law and courts. The military justice system does not extend to civilians with a few narrow exceptions (e.g., civilians serving with the armed forces in the field overseas in time of war).

42. In a trial by court martial, the accused service member is accorded the full range of constitutional rights, including representation by a qualified defence counsel at no charge to the individual. Any court martial that results in a sentence of confinement for a year or more, in discharge from the service or in capital punishment is automatically reviewed by the Service's Court of Criminal Appeals. Those courts, which are composed of senior military attorneys assigned full-time as appellate court judges, examine the records of trial for both factual and legal error. Decisions can be appealed to the United States Court of Appeals for the Armed Forces, on which five civilian judges sit. Adverse decisions can be reviewed further by the U.S. Supreme Court on a discretionary basis.

43. In fiscal year 1995 (1 October 1994 to 30 September 1995), the military Services (Army, Air Force, Navy, Marine Corps and Coast Guard) conducted 1,949 general courts martial, 3,307 special courts martial, 1,786 summary courts martial, and 75,444 non-judicial punishment actions.

44. Separate correctional facilities and programmes are operated by the military services subject to uniform rules and policies established by the Department of Defense (DoD). Pursuant to DoD Directives, commanding officers of confinement facilities are only authorized to impose one or more of the following administrative disciplinary measures for prisoner misconduct: reprimand or warning; deprivation of one or more privileges; extra duties; reduction in custody grade or classification; segregation on regular or restricted diet after medical clearance; or forfeiture or suspension of earned good time. Members of the military who have been deprived of their liberty are required to be treated humanely and with respect for their dignity and in a structured behavioural environment, the fundamental goals of which are reformation and rehabilitation.

C. Competent authorities and remedies

45. There is in the United States no single statute, authority or mechanism by which basic human rights and fundamental freedoms are guaranteed or enforced. Instead, the essential protection of human rights and fundamental freedoms is afforded by the various guarantees set forth in the federal Constitution and statutes as well as in the constitutions, statutes and law of the several states and other constituent units. Responsible authorities thus include executive branch officials, those with administrative authority, legislators and judges, among others. This

diffuse structure provides extensive legal protections and a wide variety of enforcement and remedial possibilities, ranging from criminal law enforcement, civil damage suits, and administrative measures.

46. In consequence, responsibility for the protection and promotion of fundamental freedoms, including freedom from torture, is shared by the various branches of government at all levels. In the Federal Government, the President is responsible for enforcing the law. His chief assistant in this task is the Attorney-General. Within the Department of Justice, the Civil Rights Division bears principal responsibility for the effective enforcement of federal civil rights laws, the Criminal Division and regional U.S. Attorneys Offices for prosecuting most federal crimes, and the Bureau of Prisons for the oversight and management of federal correctional institutions. At the state level, the elected Governor and/or Attorney-General may share responsibility with an independent human rights commission; many local jurisdictions, including most large cities, also have such bodies. At all levels, an independent judiciary exists to guarantee fundamental rights, including freedom from torture, cruel and unusual punishment, equal protection and due process, and a fair trial. Finally, the large and active community of non-governmental organizations in the United States works constantly to ensure that abuses that occur are brought to light and that government is responsive to the will of the people. A strong and independent press (including print and electronic media) serves an important role in this regard.

47. In 1994, Congress enacted a new federal law to implement the requirements of the Convention against Torture relating to acts of torture committed outside United States territory. This law, which is codified at 18 U.S.C. § 2340 et seq., extends United States criminal jurisdiction over any act of (or attempt to commit) torture outside the United States by a United States national or by an alleged offender present in the United States regardless of his or her nationality. The statute adopts the Convention's definition of torture, consistent with the terms of United States ratification. It permits the criminal prosecution of alleged torturers in federal courts in specified circumstances.

48. Any act falling within the Convention's definition is clearly illegal and prosecutable everywhere in the country. Because existing criminal law was determined to be adequate to fulfil the Convention's prohibitory obligations, and in deference to the federal-state relationship, it was decided at the time of ratification not to propose enactment of an omnibus implementing statute for the Convention or to adopt a single federal crime of torture.

49. Torture has always been proscribed by the Eighth Amendment to the United States Constitution, which prohibits "cruel and unusual punishments". This Amendment is directly applicable to actions of the Federal Government and, through the Fourteenth Amendment, to those of the constituent states. See Robinson v. California, 370 U.S. 660, reh'g den. 371 U.S. 905 (1962); Estelle v. Gamble, 429 U.S. 97 (1976). While the constitutional and statutory law of the individual states in some cases offers more extensive or more specific protections, the protections of the right to life and liberty, personal freedom and physical integrity found in the Fourth, Fifth and Eighth Amendments to the United States Constitution provide a nationwide standard of treatment beneath which no governmental entity may fall. The constitutional nature of this protection means that it applies to the actions of officials throughout the United States at all levels of government; all individuals enjoy protection under the Constitution, regardless of nationality or citizenship.

50. Every state constitution also contains detailed guarantees of individual liberties, in most cases paralleling the protections set forth in the federal bill of rights. For example, nearly all state constitutions expressly forbid cruel and unusual punishment (including acts constituting "torture") and guarantee due process protections no less stringent than those in the federal Constitution. The constitutions of 33 states also contain specific protections against unreasonable searches and seizures; only two state constitutions lack explicit protection against self-incrimination in criminal cases; and only five lack double jeopardy clauses. Even in such cases, however, defendants are not deprived of the protections afforded by the federal Constitution: United States constitutional protections are applicable throughout the United States, and the constitutional due process provision is broadly construed by the courts. In some cases, state law guarantees rights not explicitly recognized by the federal Constitution (such as privacy, education or access to courts), the protections afforded by state law sometimes exceeds those required by the federal Constitution.

51. Remedies. United States law provides various avenues for seeking redress, including financial compensation in cases of torture and other violations of constitutional and statutory rights relevant to the Convention. Besides the general rights of appeal, these can include any of the following, depending on the circumstances:

- Seeking a writ of habeas corpus, which guarantees judicial review of the reasons for and conditions of detention and ensures that a person who believes his or her detention violates constitutionally protected rights has access to an independent and impartial court for a determination of its propriety;
- Filing criminal charges, which can lead to investigation and possible prosecution;
- Bringing a civil action in federal or state court under the federal civil rights statute, 42 U.S.C. § 1983, directly against state or local officials for money damages or injunctive relief;
- Seeking damages for negligence of federal officials and for negligence and intentional torts of federal law enforcement officers under the Federal Tort Claims Act, 22 U.S.C. § 2671 et seq., or of other state and municipal officials under comparable state statutes;
- Suing federal officials directly under provisions of the United States Constitution for "constitutional torts", see Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and Davis v. Passman, 442 U.S. 228 (1979);
- Challenging official action or inaction through judicial procedures in state courts and under state law, based in statutory or constitutional provisions;
- Seeking civil damages from participants in conspiracies to deny civil rights under 42 U.S.C. § 1985;
- Bringing civil suits for damages based on international legal prohibitions against torture under the Alien Tort Claims Act, and the Torture Victims Protection Act, 28 U.S.C. § 1350, and note;

- Pursuing administrative remedies, including proceedings before civilian complaints review boards, for the review of alleged police misconduct;

- The Federal Government may institute civil proceedings under the Pattern or Practice of Police Misconduct Provision of the Crime Bill of 1994, 42 U.S.C. § 14141, to eliminate patterns or practices of misconduct by law enforcement agencies and their parent organizations. Similarly, the Federal Government may institute administrative and civil proceedings against law enforcement agencies receiving federal funds who discriminate on the basis of race, sex, national origin, or religion;

- Individuals may bring administrative actions and civil suits against law enforcement agencies receiving federal funding that discriminate on the basis of race, sex, national origin, or religion, under the federal civil rights laws. See 42 U.S.C. § 2000d (Title VI) and 42 U.S.C. § 3789d (Safe Streets Act);

- In the case of persons in detention, the Federal Government may institute proceedings under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, to eliminate a pattern or practice of abuse in any state prison, jail or detention facility.

52. Illustrative cases. Within the Federal Government, the Civil Rights Division of the Department of Justice is the primary institution responsible for enforcing federal civil rights statutes. While its duties are much broader, the Division, and in particular its Criminal Section, does investigate and prosecute incidents of misconduct of local, state and federal law enforcement officials. The Criminal Section receives some 8,000-10,000 complaints annually, conducts or coordinates some 3,000 investigations, and files charges in 40-50 criminal cases. Allegations of official misconduct constitute the majority of all complaints reviewed by the Section. In addition, the Special Litigation Section investigates and brings civil actions to eliminate patterns or practices of law enforcement misconduct. The Section is currently investigating complaints against a number of police departments and sheriff's offices and has filed civil suits resulting in court-enforceable agreements to eliminate systemic misconduct with several law enforcement agencies.

53. Examples of recent activity relevant to the prohibition of torture and cruel, inhuman or degrading treatment under the Convention against Torture include the following:

- In January 1995, a sheriff in Gulf County, Florida was convicted of using his position to coerce five female inmates to engage in sexual acts with him. United States v. Harrison, N.D.Fla.

- In June 1996, a foreman at the Federal Correctional Institute in Danbury, Connecticut was charged with engaging in a long-term sexual relationship with an inmate; that employee was subsequently convicted of sexual abuse of a ward under 18 U.S.C. § 2243(b).

- In February 1997, the former warden of the Pearl River County jail pleaded guilty to sexually abusing women prisoners in his custody.

- In April 1996, a New Orleans, Louisiana police officer and two other individuals were convicted of conspiring to murder a woman who witnessed the police officer beating a young man. The day after she reported the beating incident to the police department's Internal Affairs Division, the woman was shot to death while standing on a street corner. The police officer and one civilian defendant were convicted. United States v. Davis, E.D.La.

- In Texas, a Galveston police officer was sentenced to 15 years in prison after being convicted of repeatedly coercing women into engaging in sexual acts by threatening them with jail or physical harm. United States v. Sanchez, S.D. Texas, 1994.

- A Bureau of Indian Affairs officer was sentenced to 30 months in prison after pleading guilty to raping a young Indian woman when she was being detained at a BIA detention facility in Arizona. United States v. Wescogame, D. Arizona, 1993.

- In March and May 1999, the Department of Justice settled lawsuits against the States of Arizona and Michigan that were brought under the Civil Rights of Institutionalized Persons Act of 1980; the lawsuits alleged that female inmates in Arizona and Michigan prisons were being subjected to improper sexual conduct by correctional officers, including rape, sexual assault, and unlawful invasion of privacy.

- Eleven correctional officers at a Mississippi state penitentiary were charged in April 1994 in the beating of an escaped inmate when he was recaptured and handcuffed. The inmate was kicked a dozen times, thrown into the back of a pick-up truck and hit several times in the head, face and shoulder with guns. He suffered several lacerations and a severed artery. Six of the defendants pled guilty. The trial of the remaining five defendants resulted in two convictions and three acquittals.

- In May 1995, a former INS detention enforcement officer at the INS's Krome Processing Service Center pleaded guilty to beating a detainee. The detainee had been knocked unconscious and received lacerations to his face as well as bruises to his stomach. United States v. Calejo, S.D.Fla.

- In August 1997, four New York City police officers were charged with brutalizing Abner Louima, a Haitian immigrant, in Brooklyn. Two were accused of beating the victim on the way to the station house following his arrest during a scuffle outside a Flatbush nightclub; the other two were accused of assaulting him with a toilet plunger in the station house bathroom. Initially charged under state sexual abuse and assault laws, the latter were subsequently prosecuted under federal civil rights law, which permits a more severe punishment. All were suspended from duty. To date, one officer has pleaded guilty to beating and sodomizing Louima, and another was convicted of conspiracy to sodomize and of civil rights violations. Two additional officers are awaiting trial on obstruction of justice charges.

- In May 1991, members of the Los Angeles Police Department were videotaped beating a motorist, Rodney King, who had been detained for a traffic violation and was alleged to be resisting arrest. Many said the incident exemplified the use of excessive force by

police against black and Latino citizens. Following the acquittal of four officers in a Los Angeles county court on state charges, two of the four were convicted in a federal prosecution of criminal violations of the victim's civil rights. The victim has also obtained a court award of civil damages and compensation.

- In April 1997, a Federal District Court entered a consent decree between the United States and the City of Pittsburgh and the Pittsburgh Bureau of Police resolving the United States' allegations that the Police Bureau had engaged in a pattern or practice of using excessive force and had conducted improper searches and seizures. The consent decree requires the Bureau to institute comprehensive reforms in police supervision, training, discipline, and the manner in which it investigates public complaints of police misconduct.

- A similar consent decree was entered in Federal District Court in September 1997 between the Federal Government and the City of Steubenville, Ohio, and the Steubenville Police Department resolving allegations that the Police Department had been engaged in a pattern or practice of using excessive force and engaging in improper searches and seizures.

- In June 1996, the United States entered a settlement agreement with the Iberia Parish, Louisiana Sheriff's Department, requiring the department to cease using inhumane restraint techniques on detainees.

- Prisoners at the D.C. Department of Corrections Occoquan Facility, part of Lorton Prison, filed a class action challenge in federal court regarding the conditions of their confinement. Following a trial in 1989, the court ruled in their favour, describing the prison as dangerously understaffed. In December 1995 the situation had grown still worse, prompting an additional judicial finding that the prison was suffering from a "non-functional disciplinary system", rampant drug use and weapons possession, violence against both staff and prisoners, and other conditions requiring the appointment of specially appointed officers to address the prevailing "culture of violence and inmate control".

- In July 1998 the Department of Justice notified the City of Columbus, Ohio of its intent to file a civil lawsuit alleging that the Columbus police are engaging in a pattern or practice of excessive force, false arrests, and improper searches and seizures; the Department and the city currently are conducting pre-suit settlement negotiations. Similarly, in April 1999 the Department of Justice notified the State of New Jersey of its intent to file a civil suit alleging that State Police officers are engaging in a pattern or practice of conducting discriminatory traffic stops; the Department and the State are currently conducting pre-suit settlement negotiations.

- In March 1998 the United States entered into a comprehensive settlement agreement with the State of Georgia to resolve the United States' investigation of unlawful conditions of confinement at 31 juvenile correctional facilities in the State. The settlement requires the State to develop and implement remedial plans in numerous areas, including protection from harm, medical care, and mental health care. In December 1997 the United States

similarly entered into a consent decree with the Commonwealth of Puerto Rico to resolve the United States' lawsuit challenging conditions of confinement in 20 juvenile facilities in Puerto Rico. In November 1998 the United States filed suit against the State of Louisiana concerning four juvenile facilities in that state, and interim, partial agreements with the state have been reached.

- In the past several years, the United States has entered into consent decrees and settlements to obtain remedies for deficient conditions at numerous other prisons and local jails around the country, including a Montana State men's prison; facilities in the Territory of Guam and the Commonwealth of the Northern Mariana Islands; and jails in Maricopa County (Phoenix) and Gila County, Arizona, and Clay County and Dooly County, Georgia.

D. Treaties and the United States legal system

54. In addition to the Convention against Torture, the United States is party to a number of treaties concerning the protection of human rights. In 1992 the United States adhered to the International Covenant on Civil and Political Rights, article 7 of which sets forth the basic protection of all against torture and other cruel, inhuman or degrading treatment or punishment. The United States has also ratified the Convention on the Elimination of All Forms of Racial Discrimination and has signed the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.

55. Under article VI, cl. 2, of the United States Constitution, duly ratified treaties become part of the "Supreme Law of the Land", equivalent in legal stature to enacted federal statutes. Accordingly, to the extent of any inconsistency, they may displace previously adopted state and federal law and may be displaced by subsequently adopted federal law. Where they touch on matters previously within the purview of state and local government, they may also serve to "federalize" the issue, thus affecting the allocation of authority between the states and the central government.

56. In United States practice, provisions of a treaty may be denominated "non-self-executing", in which case they may not be invoked or relied upon as a cause of action by private parties in litigation. Only those treaties denominated as "self-executing" may be directly applied or enforced by the judiciary when asserted by private parties in the absence of implementing legislation. This distinction derives from the U.S. Supreme Court's interpretation of article VI, cl. 2, of the Constitution. See Foster v. Neilson, 27 Pet. 253, 314 (1829). The distinction is one of domestic law only; in either case, the treaty remains binding on the United States as a matter of international law.

57. Even where a treaty is "non-self-executing", courts may nonetheless take notice of the obligations of the United States thereunder in an appropriate case and may refer to the principles and objectives thereof, as well as to the stated policy reasons for ratification. See, e.g., Sale v. Haitian Centers Council, 509 U.S. 155 (1994).

58. Generally, when necessary to carry out its treaty obligations, and in particular when existing domestic law must be conformed to the requirements of the treaty, the United States

will, as a matter of domestic procedure, enact implementing legislation. This was the case, for example, with the Genocide Convention (for which implementing legislation is codified at 18 U.S.C. §§ 1091-93). Where domestic law already makes adequate provision for the requirements of the treaty and is sufficient to enable the United States to meet its international obligations, the United States does not generally believe it necessary to adopt implementing legislation.

59. In the case of the Convention against Torture, as noted above, implementing legislation was adopted with respect to the obligations imposed by article 5 concerning jurisdiction over extraterritorial acts of torture by United States citizens and by others "found" in the United States whom it does not extradite. In addition, the obligations of article 3 ("non-refoulement") have been effectively implemented through federal administrative process and procedure and regulations. See 22 C.F.R. Parts 3, 103, 208, 235, 238, 240, 241 and 253, reprinted in 64 Federal Register 33 at 8478-8496 (19 February 1999) (INS regulations); 22 C.F.R. Part 95, reprinted in 64 Federal Register 38 at 9435-9437 (26 February 1999) (Department of State regulations).

60. Non-self-executing declaration. More generally, however, the United States considered existing law to be adequate to its obligations under the Convention and determined that it would not be appropriate to establish a new federal cause of action, or to "federalize" existing state protections, through adoption of omnibus implementing legislation. For those reasons, in its instrument of ratification, the United States declared the substantive provisions of the Convention (arts. 1-16) to be "non-self-executing". Thus, as a matter of domestic law, the treaty in and of itself does not accord individuals a right to seek judicial enforcement of its provisions. However, this declaration in no way limits or circumscribes the international obligations of the United States under the Convention.

61. Judicial reference to the Convention. The Convention against Torture has been cited and referenced in a number of federal judicial proceedings to date, including, inter alia, the following decisions: Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (suit by expatriate Guatemalans against the former Minister of Defense of Guatemala under the Alien Tort Claims Act and Torture Victims Protection Act); Kadic v. Karazdic, 70 F.3d 232 (2d Cir. 1995) (suit by Bosnians against the self-proclaimed president of Bosnia-Herzegovina for torture, genocide and other crimes under TVPA and ATCA); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) (suit by Argentinian family against the Government of Argentina for torture); In Re Estate of Ferdinand E. Marcos, 25 F.3rd 1467 (9th Cir. 1994), see also 94 F.3d 539 Cir. 1996) (suit under ACTA against former Philippine President Marcos alleging torture and other cruel, inhuman and degrading treatment); Hilao v. Estate of Ferdinand Marcos, 103 F.3d 767 (9th Cir. 1996) (also suit against former President Marcos under ATCA); In Re Extradition of John Cheung, 968 F. Supp. 791 (D. Conn. 1997) (application of non-refoulement provision of the Convention against Torture to extradition request from Hong Kong). See also U.S. v. Ekwunoh, 888 F. Supp. 369 (E.D.N.Y. 1994).

62. A number of federal courts have also recognized that the right to be free from torture and cruel, inhuman or degrading treatment or punishment is an accepted norm of customary

international law. See Abebe-Jira v. Negero, 72 F.3d 844 (11th Cir. 1996), cert. denied, 519 U.S. 830, 117 S.Ct. 961 (1996); Najarro de Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir. 1985); Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995).

63. In many of these cases, United States courts looked to the Convention for guidance in determining whether there exists a customary international legal norm which prohibits torture and cruel, inhuman or degrading treatment or punishment. Although it is not self-executing, the Convention was viewed by these courts as illustrative of the general agreement among states that such practices are unlawful. Thus, the Convention has played a significant role in the development of international human rights law in United States courts.

E. Information and publicity

64. As a general matter, people in the United States are keenly aware of and assertive about their rights. Students at all levels of the educational system receive extensive instruction in, and exposure to, fundamental civil and political rights, including those relevant to the prohibition and prevention of torture and cruel, inhuman or degrading treatment or punishment. The scope, meaning and enforcement of individual rights are constantly discussed in the media, openly and vibrantly debated within the legislatures by political parties, and litigated before the courts at all levels.

65. Information about human rights treaties is freely and readily available to any interested person in the United States. The constitutional requirement that the U.S. Senate give its advice and consent to ratification of treaties ensures that there is a public record of its consideration, typically on the basis of a formal transmittal by the President, a record of the Senate Foreign Relations Committee's public hearing and the Committee's report to the full Senate, together with the action of the Senate itself. Moreover, the text of any such treaty, whether or not the United States is a party, can be readily obtained from any number of sources.

66. In the case of the Convention against Torture, the record of its consideration is set forth in several official documents, including, inter alia, the Message from the President transmitting the Convention to the Senate, dated 20 May 1988 (Sen. Treaty Doc. 100-20); the printed record of the public hearings before the Senate Foreign Relations Committee on 30 January 1990 (S. Hrg. 101-718); the Report and Recommendation of the Senate Foreign Relations Committee, dated 30 August 1990 (Exec. Report 101-30); and the record of consideration on the floor of the Senate on 27 October 1990, printed at Cong. Rec. S14486 (daily ed.).

67. At the hearing before the Senate Foreign Relations Committee, representatives of various non-governmental organizations involved in human rights, as well as concerned academics and legal practitioners, appeared to testify in person or submitted written comments for consideration by the Committee and inclusion in its formal records. The Administration was represented by the Departments of Justice and State.

68. As part of a programme to increase public awareness of human rights obligations throughout the country, this report is being published and made available to the public through the Government Printing Office and the depositary library system. In addition, copies of the

report and the Convention are being widely distributed within the executive branch of the United States Government and to federal judicial authorities, as well as to relevant state officials, state and local bar associations and non-governmental human rights organizations. Further, a copy of this report will be posted on the U.S. Department of State web page: <http://www.state.gov>.

69. Copies of the Convention have been provided to the Attorneys-General of the 50 states and of the other constituent units of the United States, with a request that it be further distributed to local officials within their respective jurisdictions.

F. Factors affecting implementation

70. The United States Government acknowledges continuing allegations of specific types of abuse and ill-treatment in particular cases, the existence of areas of concern in the context of the criminal justice system, and obstacles to full achievement of the goals and objectives of the Convention. These include allegations and instances (and in some cases even patterns or practices) of:

- police abuse, brutality and unnecessary or excessive use of force, including inappropriate use of devices and techniques such as tear gas and chemical (pepper) spray, tasers or "stun guns", stun belts, police dogs, handcuffs and leg shackles;

- racial bias and discrimination against members of minorities, as reflected, inter alia, in statistical disparities in instances (as well as allegations) of harassment and abuse;

- sexual assault and abuse of prisoners by correctional officers and other prisoners;

- ill-treatment of and discrimination against prisoners in custody, including inadequate medical care, especially for those with mental illnesses or who are HIV-positive;

- lack of police accountability, including failure to discipline, prosecute and punish police misconduct;

- overcrowding of prison facilities;

- excessively harsh conditions and unnecessarily stringent procedures in "supermaximum" security facilities for violent prisoners, including wrongful confinement to such units;

- confinement of children in substandard or abusive correctional facilities;

- under-funding of governmental agencies, including correctional institutions.

71. The United States Government is aware of these difficulties and is working to overcome them. At the same time, the Government believes that, overall, the country's law enforcement agencies and correctional institutions set and maintain high standards of conduct for their officers and treatment for persons in their custody. Among the elements that promote compliance with the standards of the Convention are strong policy guidance and enforcement

from the Federal Government, independent promotional and investigative activities by knowledgeable non-governmental groups and organizations, and the availability of effective administrative and judicial remedies for those who believe they have been the victims of abuse or excess.

G. Statistics

72. In the United States there exists no single, comprehensive collection or collation of national statistics regarding allegations or complaints of torture, excessive use of force by police or lesser forms of official ill-treatment, nor is there any centralized register of persons arrested or detained, lawsuits filed, trials held, sentences imposed or damage awards rendered for such violations. The reason lies primarily in the diffusion of criminal justice authority.

73. Recognizing the lack of reliable information on incidents of use of excessive force by police, the U.S. Congress has recently mandated the collection and annual reporting of data on the subject by the U.S. Attorney-General. See § 210402, Title XXI, Subtitle D, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322. Under the Attorney-General's direction, the Bureau of Justice Statistics (an agency within the Office of Justice Programs in the U.S. Department of Justice) and the National Institute of Justice are jointly pursuing efforts to collect national data on police use of force. Their first report, entitled "National Data Collection on Police Use of Force", was published in April 1996, and summarizes earlier data collection efforts.

74. Other resources of statistical information at the federal level include: (1) the annual report of the Federal Bureau of Investigation entitled "Crime in the United States"; (2) the FBI's Uniform Crime Reporting Program, which canvasses some 16,000 law enforcement agencies throughout the country; (3) the DOJ's National Crime Victimization Survey; and (4) the annual report of the U.S. Parole Commission.

75. At the state and local levels, information has been even more difficult to obtain. Each state now has a uniform crime reporting or criminal justice information centre or records bureau which provides information to the national government. Among other available resources are those of the National Center for State Courts.

76. The following data, like the statistics elsewhere in this report, are drawn primarily from publicly available official United States Government sources, in particular the various publications of the U.S. Census Bureau and the Department of Justice's Bureau of Justice Statistics.

77. Population. As of mid-1997, the overall population of the United States was estimated to be 267 million. Of that total, 33.8 million (or 13 per cent) describe themselves as black; 2.3 million (1 per cent) self-identified as American Indian, Eskimo or Aleut; and 10 million (4 per cent) considered themselves to be Asian or Pacific Islanders. Some 29 million (11 per cent) were of Hispanic origin. About 25.8 million (9.7 per cent) were foreign born. Of these, 27 per cent were born in Mexico; other principal countries of origin were the Philippines, China (including Hong Kong), Cuba, India, Viet Nam, El Salvador, Canada, the Republic of Korea, Germany and the Dominican Republic. In California, nearly one in four residents was

foreign born; other states with large foreign born populations include New York, Florida, New Jersey and Texas. Nearly one in four foreign born residents has become a United States citizen.

78. Correctional population. The Bureau of Justice Statistics estimates that as of July 1999, approximately 1.7 million adults were currently incarcerated in the United States, of whom slightly more than two thirds were in federal or state facilities and the remainder in local jails. The federal inmate population was estimated at 129,678, with 117,331 housed in Bureau of Prisons operated facilities and 12,347 in contract facilities, including community corrections centres or "halfway houses". The state institutional population is estimated at over 1.1 million. Some 637,000 were in local jails or under correctional supervision.

79. The United States currently has the largest prison population and the highest incarceration rate of any country. Sentenced inmates numbered about 436 per 100,000 residents. By mid-year 1997, 1 in every 155 United States residents was incarcerated.

80. On average, the incarcerated population has grown 6.5 per cent since 1990. The sentenced federal prison population has grown at a faster rate than that of the states. At mid-1995, the nation's 1,500 adult correctional facilities had a capacity of 976,000 beds.

81. It is estimated that state prisons currently operate at between 16 per cent and 24 per cent over their reported capacity, and the federal correctional system at 19 per cent over its rated capacity. State and federal authorities have built 213 new prisons between 1990 and 1995, an increase of 17 per cent in facilities and some 280,000 new beds. Over 50 per cent of the nation's prisons are less than 20 years old.

82. Among the reasons for the continuing increase of persons in detention are: an increasing number of arrests, especially for assault, drug offences and firearms violations; an increasing number of felony convictions in state and federal courts (up 5 per cent in 1994 over 1990); an increase in time served (versus length of sentence imposed); and the adoption of more stringent recidivist (habitual offender) laws.

83. In 1994 the average prison sentence imposed by state courts was six years, and by federal courts six and a half years. However, most federal prisoners (about 60 per cent) are drug offenders and on the average serve three years longer than state prisoners because the federal drug laws entail more serious punishments. Some 47 per cent of all state prisoners are serving time for violent crimes. According to a 1993 survey, 27 per cent of federal inmates and 61 per cent of state inmates had a current or past sentence for a violent crime. Approximately 12 per cent of federal prisoners and 16 per cent of state prisoners were armed when they committed the offences of which they were convicted.

84. In 1994, an estimated 14.6 million arrests were made for all criminal infractions other than traffic violations, most of them for offences involving larceny/theft; the arrest rate was 5,715 per 100,000 population.

85. At the same time, the total number of crimes has fallen in recent years, according to the FBI's Uniform Crime Reports. Violent crimes (such as rape, murder, robbery and aggravated assault) have fallen from 3.5 million in 1992 to 3.3 million in 1995.

86. Nationally, black non-Hispanics constitute about 44 per cent of the prisoner population, white non-Hispanics 40 per cent, Hispanics 15 per cent, and others (Asians, Pacific Islanders, native Americans and Alaskan Natives) 1-2 per cent. Among federal prisoners, the proportion of black non-Hispanics was about 38 per cent and Hispanics about 30 per cent. Relative to the number of residents in the United States population as a whole, black non-Hispanic males are statistically more than twice as likely to be incarcerated as Hispanics and seven times as likely as white non-Hispanics.

87. As of July 1999, women inmates comprised 7.5 per cent of all federal prisoners. In local jails, males constitute approximately 90 per cent of the inmate population. While men are 16 times more likely to be incarcerated, the number of women in custody is increasing faster than the rate for men.

88. Juveniles (generally defined by state law as persons under age 18) are usually subject to the separate juvenile justice system. Most are housed in detention facilities or correctional institutions specifically established and maintained for them. Sometimes juveniles who have been accused or convicted of acts that are crimes when committed by adults are held in local jails, where as a rule they are separated by sight and sound from the general inmate population. For certain especially serious crimes, juveniles may be accused and prosecuted as adults. Although the total number of juvenile violent crime arrests continues to decline, in 1996 juveniles still accounted for 19 per cent of all such arrests (including for murder, forcible rape, robbery and aggravated assault).

89. Abuse and brutality. The absence of reliable national statistics precludes an accurate statistical description of the frequency with which incidents of abuse and brutality by law enforcement officers take place. Within the federal prison system, however, the number of complaints from inmates is numerically small. Between 1 January 1995, and 31 December 1997 there were 2,147 allegations of staff misconduct concerning physical abuse, verbal/mental/ emotional abuse, sexual assault, or excessive use of force. Of this total, 117 were sustained (5.4 per cent) and 384 were pending investigation. Of the cases closed during fiscal year 1998, there were allegations of physical abuse of inmates against 425 staff members. Physical abuse of inmates was sustained administratively against 13 (3.1 per cent) of these individuals. None of the staff involved were convicted of criminal violations.

90. Also during fiscal year 1998, sexual abuse of inmates was sustained against a total of 24 BOP and non-BOP contract employees. A total of 16 staff were convicted of criminal violations. Twenty-three of the 24 employees either resigned or were terminated. One contract employee who was involved in a relationship with a former facility resident was prohibited from working with federal inmates and was reassigned.

91. The most common allegations concerned physical abuse, verbal/mental/emotional abuse, sexual assault, and excessive use of force. The majority of complaints concern abuse by other inmates, rather than guards or other correctional personnel.

92. The inmate death rate has declined significantly over the past several decades. In 1995 it was 311 per 100,000 inmates in state prisons. Most of those deaths (156 per 100,000) resulted from illness or natural causes other than AIDS (which accounted for another 100 per 100,000). The suicide rate was 16 per 100,000. In 1998, the death rate for federal prisoners was 231 per 100,000, and the suicide rate for federal prisoners was 11 per 100,000. Over the past five years the suicide average has been 13 per 100,000.

93. At the end of 1995, 2.3 per cent of all state and federal prisoners were reported by prison authorities to be infected with the human immunodeficiency virus (HIV). The rate for state prisoners alone was 2.4 per cent, and for federal prisoners approximately 1 per cent.

II. IMPLEMENTATION OF SPECIFIC ARTICLES

Articles 1 and 2: Definition and prohibition

A. Definition of torture

94. United States understandings. In order to clarify the meaning of "torture" and to delineate the scope of application of the Convention with the greater precision required under United States domestic law, the United States conditioned its ratification upon several understandings related to article 1. The full text of these understandings is at annex I. In essence, they provide that:

95. The intentional infliction of "mental" pain and suffering is appropriately included in the definition of "torture" to reflect the increasing and deplorable use by States of various psychological forms of torture and ill-treatment, such as mock executions, sensory deprivations, use of drugs, and confinement to mental hospitals. As all legal systems recognize, however, assessment of mental pain and suffering can be a very subjective undertaking. There was some concern within the United States criminal justice community that in this respect the Convention's definition regrettably fell short of the constitutionally required precision for defining criminal offences. To provide the requisite clarity for purposes of domestic law, the United States therefore conditioned its ratification upon an understanding that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality.

96. For similar reasons of clarity and specificity, United States adherence was conditioned on the understanding that the definition of "torture" in article 1 is intended to apply "only to acts directed against persons in the offender's custody or physical control" in order to clarify the relationship of the Convention to normal military and law enforcement operations.

97. A further understanding was intended to make clear that the term "sanctions" in article 1 includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. However, as this understanding explicitly noted, a State party could not through the imposition of domestically lawful "official sanctions" defeat the object and purpose of the Convention to prohibit torture.

98. The United States further stated its view that the term "acquiescence", as used in article 1, requires that a "public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity". The purpose of this condition was to make it clear that both actual knowledge and "wilful blindness" fall within the definition of "acquiescence" in article 1.

99. Finally, in order to guard against the improper application of the Convention to legitimate law enforcement actions, the United States stated its understanding that non-compliance with applicable legal procedural standards (such as the Miranda warnings referred to above) does not per se constitute "torture".

B. Prohibition of torture

100. Every act of torture within the meaning of the Convention is illegal under existing federal and state law, and any individual who commits such an act is subject to penal sanctions as specified in criminal statutes. Such prosecutions do in fact occur in appropriate circumstances. Torture cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer.

101. United Stares law recognizes and protects the fundamental right of everyone to life, liberty and inviolability of his or her person. Every system of criminal law in the United States clearly and categorically prohibits acts of violence against the person, whether physical or mental, which would constitute an act of torture within the meaning of the Convention. Such acts may be prosecuted, for example, as assault, battery or mayhem in cases of physical injury; as homicide, murder or manslaughter when a killing results; as kidnapping, false imprisonment or abduction where an unlawful detention is concerned; as rape, sodomy, or molestation; or as part of an attempt or a conspiracy, an act of racketeering, or a criminal violation of an individual's civil rights. While the specific legal nomenclature and definitions vary from jurisdiction to jurisdiction, it is clear that any act of torture falling within the Convention would in fact be criminally prosecutable in every jurisdiction within the United States.

102. In some jurisdictions, state law currently recognizes a specific crime of "murder by torture" as a statutorily enumerated type of first-degree murder ("intentional homicide") involving wilful, deliberate and premeditated infliction of pain and suffering and subject to especially severe penalties ("malice aforethought"). See, e.g., Idaho I.C. §§ 18-4001 and 18-4003; Nevada N.R.S. § 200.033; New York Penal § 125.27; South Carolina Code 1976 § 16-3-20; Tennessee T.C.A. § 39-13-204. In few state or local jurisdictions, however, is "torture" itself a separate crime. But see California Penal Code Title 8 § 206 (prohibiting torture); Conn. G.S.A. § 53-20 (cruelty to persons); Alabama Stats. § 13A-6-65.1 ("sexual torture" as a Class A felony).

103. Eighth Amendment. Perhaps the strongest and clearest protection against torture is afforded by the Eighth Amendment to the United States Constitution, which prohibits "cruel and unusual punishments".

104. This prohibition is directly applicable to actions of the Federal Government and, through the Fourteenth Amendment, to actions of the states and localities. Robinson v. California, 370 U.S. 660 (1962). It encompasses uncivilized or inhuman punishments, punishments which fail to comport with human dignity, and punishments which include undue physical suffering. Furman v. Georgia, 408 U.S. 238 (1972). It covers punishments which, although not physically "barbarous", involve the unnecessary and wanton infliction of pain, or are "grossly disproportionate" to the severity of the crime. Hence, it includes punishments which are totally without penological justification, Rhodes v. Chapman, 452 U.S. 337 (1981), as well as prison work requirements which compel inmates to perform physical labour which is beyond their strength, which endangers their lives, or which causes undue pain, Ray v. Mabry, 556 F.2d 881 (8th Cir. 1977). Punishment at "hard labour" is no longer available as a criminal sanction under federal law, having been held many years ago to constitute excessive and grossly disproportionate punishment. Weems v. United States, 217 U.S. 349 (1910).

105. As custodians of large numbers of convicted criminals, including many dangerous individuals, prison officials may use reasonable force for purposes of self-defence, the defence of third persons, enforcement of prison rules and regulations, and prevention of escape and crime. However, the Eighth Amendment forbids public officials from deliberately inflicting pain on prisoners in an unnecessary and wanton manner, such as through beatings. In Hudson v. McMillian, 503 U.S. 1 (1992), prison officials had handcuffed and shackled a prisoner and beaten him after an argument; the inmate received bruises, swelling, loosened teeth and a cracked dental plate. The U.S. Supreme Court found that this ill-treatment constituted excessive force, in violation of the Eighth Amendment, even though the prisoner's injuries were not serious. The Court also found culpable a supervisor who observed, but did not participate in the beating, on the ground that he should have acted to protect the victim. In Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971), prison officials were found to have committed unprovoked acts of brutality when they recaptured the prison after bloody rioting by inmates; a federal appellate court enjoined state officials from future acts of brutality and torture.

106. The Eighth Amendment has also been interpreted to apply to (1) inadequate conditions of confinement resulting from an official's "deliberate indifference" to identifiable human needs (such as continuous deprivation of food, warmth, and exercise), Wilson v. Seiter, 501 U.S. 294 (1991), and possibly overcrowding of facilities, Rhodes v. Chapman, 452 U.S. 337 (1981); (2) excessive use of force by prison officials, as well as failure to protect inmates from physical attacks by other inmates, and inadequate training or screening of guards, Whitley v. Albers, 475 U.S. 312 (1986); and (3) inadequate provision of medical, dental and psychiatric care, including an official's deliberate indifference to an inmate's serious medical needs which exceeds simple medical malpractice, Estelle v. Gamble, 429 U.S. 97 (1976), and Farmer v. Brennan, 511 U.S. 825 (1993) (prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement).

107. Because the Eighth Amendment incorporates contemporary standards of decency, its interpretation continues to evolve. In Helling v. McKinney, 509 U.S. 25 (1992), for example, the U.S. Supreme Court held that the health risks posed by involuntary exposure of prison inmates to environmental tobacco smoke can form the basis of a claim under the Eighth Amendment. As stated earlier in DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 199-200 (1989),

> "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being ... The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs - e.g., food, clothing, shelter, medical care, and reasonable shelter - it transgresses the substantive limits on state action set by the Eighth Amendment ..."

108. As a technical legal matter, the protections of the Eighth Amendment apply only to "punishments", that is, to the treatment of individuals who have been convicted of a crime and are therefore in the custody of the Government. Ingraham v. Wright, 430 U.S. 651 (1977); United States v. Lovett, 328 U.S. 303 (1946).

109. Military justice system. The Eighth Amendment applies with equal force to the military justice system. Moreover, article 55 of the Uniform Code of Military Justice ("UCMJ") specifically prohibits punishment by flogging, branding, marking or tattooing on the body, or any other cruel or unusual punishment. The article also prohibits the use of restraints known as "irons" whether single or double, except for the purpose of safe custody. Indeed, a commanding officer who orders such punishment would be acting outside the scope of his or her position and would be individually liable for the intentional infliction of bodily and emotional harm. In addition, article 93 of the UCMJ makes it a criminal offence for a military member to engage in acts constituting cruelty and maltreatment (including sexual harassment) toward a subordinate.

110. Under the UCMJ, an individual may be apprehended ("arrested") only upon reasonable belief that an offence has been committed and that the person apprehended has committed it. Permissible grounds for, and conditions of, pre-trial confinement are also spelled out in the UCMJ, including the right of the person confined to be notified of the nature of the offence charged, to remain silent, to retain civilian counsel at no expense to the Government, to military counsel at no cost, and to be familiar with the procedures for review of pre-trial confinement. Pre-trial confinement must be affirmed by the commander within 72 hours, and a pre-trial confinement hearing is required to be conducted by a neutral and detached magistrate who may order the release of the person being confined. Once charges against the detainee are referred to trial by court martial, the appropriateness of pre-trial confinement may again be reviewed by the military judge.

111. The Department of Defense has adopted the "Common Rule" for human subjects of medical research referred to below. See 32 C.F.R. Part 219.

112. Other constitutional provisions. Because the Eighth Amendment by its terms applies to "punishments", courts have looked to other constitutional provisions, in particular the Fourth

Amendment's protections against unreasonable searches and seizures and the due process requirements of the Fifth and Fourteenth Amendments, to preclude the abuse or ill-treatment of individuals in other custodial circumstances. These constitutional protections are applicable and enforced at all levels of government.

113. The Fourth Amendment provides that all persons shall be free from unreasonable searches and seizures and that "no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

114. The Fourteenth Amendment provides that "[n]o State [shall] deprive any person of life, liberty or property without due process of law". The Fifth Amendment applies to the Federal Government and similarly provides that no person shall "be deprived of life, liberty, or property without due process of law". The principle of due process provides a broad and flexible measure of protection against abuse of state power. The due process clauses of the Fifth and Fourteenth Amendments may reach actions that are technically outside Eighth Amendment purview, such as excessive use of force by law enforcement personnel during the investigative or pre-trial stages. Denial of pre-trial release by itself may implicate substantive and procedural due process concerns. United States v. Salerno, 481 U.S. 739 (1987).

115. Although the Eighth Amendment does not apply to "pre-trial detainees", i.e., persons lawfully arrested but not yet convicted and sentenced, the courts have ruled that such individuals enjoy equivalent protection under the Fourteenth Amendment with regard to conditions of detention. "[S]tates may not impose on pre-trial detainees conditions that would violate a convicted person's Eighth Amendment rights." Hamm v. DeKalb County, 774 F.2d 1567, 1573-74 (11th Cir. 1985), cert. denied 475 U.S. 1096 (1986). See also Graham v. Connor, 490 U.S. 386 (1989) (the Due Process Clause of the Fourteenth Amendment protects a pre-trial detainee from the use of force that amounts to punishment); Bell v. Wolfish, 441 U.S. 520 (1979); Ingraham v. Wright, 430 U.S. 651 (1977). In Lancaster v. Monroe County, Ala., 116 F.3d 1419 (11th Cir. 1997), a federal court of appeal stated that the minimum standard of medical care owed to a pre-trial detainee under the Fourteenth Amendment is the same as that required under the Eighth Amendment for a convicted prisoner.

116. The Fifth Amendment safeguards the right of an individual not to be compelled to testify against himself or herself. The Fourteenth Amendment's Due Process Clause protects against tortious acts employed with the intention of compelling confessions through fear of hurt, ill-treatment or exhaustion. Adamson v. California, 332 U.S. 46 (1947).

117. The law also directly regulates the official use of force. Prison guards, sheriffs, police, and other state officials who abuse their power through the excessive use of force may be punished under the criminal provisions of the federal Civil Rights Acts, 18 U.S.C. §§ 241 and 242. Where law enforcement officials are involved in the excessive use of force, individually or in a conspiracy, victims are also protected with respect to the rights secured by the Fourth, Fifth, Eighth and Fourteenth Amendments, depending on the circumstances and the status of the victims.

118. State constitutions. Equal or additional protections are afforded under state constitutional law. For example, the Oregon Constitution provides that "no person arrested, or confined to jail, shall be treated with unnecessary rigor". Oreg. Const. article I, § 13. This provision has been interpreted to include physically brutal treatment and to extend to needlessly harsh, degrading or dehumanizing treatment. It prohibits assaults by police officers and intimate touching by prison guards of the opposite sex, and it requires custodial officials to provide an environment that does not unnecessarily subject inmates to excessive health hazards.

119. A majority of state constitutions contain search and seizure provisions substantively identical to the Fourth Amendment, and many states (though not all) have adopted the "exclusionary rule" in state constitutional law independent of the federal rule. See, e.g., State v. Dukes, 209 Conn. 98, 547 A.2d 10 (1988); State v. Johnson, 110 Idaho 516, 716 P.2d 1288 (1986).

C. Specific procedural protections

120. In addition to the prohibition against cruel and unusual punishment and the protections of the Due Process Clause, the United States criminal justice system contains a number of specific procedural mechanisms which, taken together, offer strong additional protections against the occurrence of torture and remedial opportunities in the event that it nonetheless occurs. At the risk of over-simplifying a complex body of law and procedure, these protections may be summarized as follows.

121. Habeas corpus. Of principal significance is the constitutionally recognized right of habeas corpus, which affords individuals in custody the right to an immediate judicial hearing on the legality and the conditions of their confinement and an order directing the detaining official to release them, if appropriate. In particular, a person in custody who has not been formally arrested and provided a preliminary hearing as required by law may seek immediate release by filing an application for a writ of habeas corpus in state or federal court. The writ can also be used to seek review of a final conviction, to challenge execution of a sentence, or to contest the legality of an order of confinement not resulting from a criminal sentence, for example a commitment to custody for mental incompetence or for extradition reasons. This right ensures, for example, that suspects in the United States may not be held "incommunicado".

122. Arrest and detention. United States law imposes strict rules regarding arrest and detention of suspects by agents of the state and effectively protects individuals against arbitrary arrest and detention.

123. A person may ordinarily be detained only for a brief period unless he or she has been formally arrested or charged with a crime by complaint or indictment, or refuses to obey a lawful court order (but only so long as he or she refuses to obey). Under the Fourth Amendment, persons may be arrested only if there is "probable cause" to believe they have committed a crime. A judicial officer must authorize such detention, either by issuing a warrant for the person's arrest or, when the arrest has taken place without a warrant, by approving the arrest within a short time (i.e., within 48 hours) after it occurs. State law also generally requires an arrest warrant except when the arresting authorities observe a crime in progress.

124. In this respect, United States law does not permit "preventive detention" solely for purposes of investigation, as it is practised in many countries. Officers must have a particularized and objective basis for suspecting an individual of criminal activity before they may detain him or her for even a limited purpose or duration (such as a "stop and frisk"). Moreover, the Fourth Amendment also protects against physical ill-treatment at the stage of arrest or investigatory stop. An objectively unreasonable use of force is not permissible. Graham v. Connor, 490 U.S. 386 (1989). In addition, the judicial officer must authorize the continued detention of the arrestee following a hearing at which it is determined that there is sufficient reason to believe the person will flee from justice or pose a threat to the public if released.

125. These constitutional requirements are binding on all levels of government within the United States. Additionally, states through their separate laws guarantee that individuals will not be arbitrarily arrested and detained by state authorities and also require prompt notification of charges and a speedy trial.

126. Right to be informed. Persons under arrest must at a minimum be informed of the offence with which they are charged and given an opportunity to see the arrest warrant as soon as is practicable. In the case of a warrantless arrest, the arresting authority must inform the arrestee of the basis for the arrest. State and federal law generally impose similar requirements in this regard.

127. Right to counsel. The right to counsel in criminal cases is guaranteed by the Sixth Amendment to the United States Constitution. This right is binding on the states via the Fourteenth Amendment. In addition, the right is also guaranteed by similar or analogous language in every state constitution (except that of Virginia). The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense". While primarily reflecting the need for legal representation at trial, this right has been interpreted to apply whenever adversarial judicial proceedings have begun, whether or not the individual is in custody. See Massiah v. United States, 377 U.S. 201 (1964) (government attempts deliberately to elicit confession or incriminating statements after the initiation of formal charges may interfere with the right to counsel and therefore render such statements inadmissible as evidence).

128. The right to counsel applies at the preliminary hearing stage, at arraignment, and at the post-trial (sentencing) phase. See Coleman v. Alatan, 339 U.S. 1 (1990); Michigan v. Jackson, 475 U.S. 625 (1986); and Mempa v. Rhay, 389 U.S. 128 (1967). It can also apply to custodial interrogations. In Escobedo v. Illinois, 378 U.S. 478 (1964), the defendant's confession was excluded ("suppressed") because the police had violated his Sixth Amendment rights by telling him incorrectly at the time of interrogation that his attorney did not want to see him.

129. Inability to afford representation cannot deprive an accused of his or her right to counsel. In Gideon v. Wainwright, 372 U.S. 335 (1962), the U.S. Supreme Court found that the Sixth Amendment mandated state-paid counsel for the trial of indigent felony defendants. The right was extended to all cases including misdemeanors in which imprisonment is imposed. Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972). Hence, no state can sentence an indigent convicted defendant to a term of imprisonment unless it has afforded him or

her the right to assistance of appointed counsel. Constitutional notions of due process also require provision of counsel in appeals as of right. Evitts v. Lucey, 469 U.S. 387 (1985).

130. The conceptually separate Fifth Amendment right to counsel is based on the privilege against self-incrimination as it applies during custodial law enforcement interrogation and can apply even when the Sixth Amendment does not. See Miranda v. Arizona, 384 U.S. 436 (1966).

131. In some instances, state law provides, or has been interpreted to provide, defendants with even greater rights concerning assistance of counsel than the protections derived from the federal Constitution. Both Hawaii and Louisiana, for instance, provide indigents more extensive entitlement to state-appointed attorneys than is required by the United States Constitution under Gideon v. Wainwright, 372 U.S. 335 (1963) and Argersinger v. Hamlin, 407 U.S. 25 (1972). In New Jersey, the state Supreme Court has held that the consent of defence counsel is required before the prosecutor may initiate conversations with the defendant after indictment and before arraignment. See State v. Sanchez, 129 N.J. 261, 609 A.2d 400 (1992). New York law prohibits uncounselled waivers of Sixth Amendment rights, People v. West, 81 N.Y.2d 370, 599 N.S.S.2d 484 (1993). The California state Constitution extends the right to counsel to pre-indictment line-ups. People v. Bustamonte, 30 Cal.3d 88, 177 Cal. Rptr. 576 (1981).

132. Custodial interrogation. United States law provides several protections against physical and mental compulsion, threats and inducements of individuals in custody. Under the Fifth Amendment's privilege against compelled self-incrimination and the rule imposed by the U.S. Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), the police must inform the individual that he or she has the right to remain silent, that any statements he or she makes can be used against him or her in court, that he or she has the right to consult a lawyer and to have the lawyer present during interrogation, and that if he or she cannot afford a lawyer one will be appointed to represent him or her prior to questioning. These rights (commonly called "Miranda rights") ordinarily attach when an individual is first subjected to custodial interrogation, even if it is in respect of a minor offence.

133. Initial appearance. Every detainee must be brought promptly before a judicial officer for an initial appearance, even when the arrest has been made pursuant to a duly issued warrant based on a showing of probable cause. Persons arrested without a warrant must be brought before a magistrate for a finding of probable cause within a reasonable time. Although "reasonable time" is not specifically defined, the U.S. Supreme Court has held that it generally cannot be more than 48 hours. See County of Riverside v. McLaughlin, 500 U.S. 44 (1991). Some states apply more stringent standards to bar detention for even that length of time.

134. At the initial appearance, the accused is informed of the charges, of the right to remain silent and the consequences of choosing to make a statement, the right to request assistance of counsel, and of the general circumstances under which one can obtain pre-trial release (e.g., bail). A delay in the initial appearance may be a factor in assessing the voluntariness of any inculpatory statement made by the accused, and hence its admissibility. See McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957).

135. Exclusionary rule. Protection against self-incrimination, guaranteed under the Fifth Amendment in federal proceedings (and through the Fourteenth Amendment in state and

local proceedings), operates to deter police misconduct by ordinarily preventing the Government from using the improperly obtained statement against the individual concerned. The exclusionary rule also operates with respect to violations of the Fourth Amendment (e.g., with respect to physical or bodily evidence) and the Sixth Amendment (e.g., right to counsel). As indicated above, in many instances, state law independently provides for exclusion of illegally obtained evidence.

136. Pre-trial release. Conditional release of the accused is the norm in the United States criminal justice system. While there is no constitutional right to bail (the Eighth Amendment prohibits "excessive bail"), the general rule in both the federal and the state judicial systems is that persons will not be detained in custody unless the judicial officer cannot be assured that there are conditions of release which will reasonably guarantee the safety of the public and the appearance of the individual at the criminal trial. In the federal system, the 1966 Bail Reform Act, 18 U.S.C. §§ 3141 et seq., last amended in 1984, provides that (except for particularly dangerous persons or persons likely to flee if not detained), defendants awaiting trial may be released on their own "personal recognizance", upon the execution of an unsecured appearance bond, or upon other conditions set by the court. State procedures are similar; various states take into account different factors in setting bail, and some states have no statutory scheme.

137. Speedy trial. The Sixth Amendment guarantees all accused individuals a right to a "speedy and public trial". In the federal system, this right is implemented by the Speedy Trial Act of 1974, codified at 18 U.S.C. §§ 3161-3174 (last amended in 1984). The right to a speedy and public trial applies to the states under the Fourteenth Amendment, Klopfer v. North Carolina, 386 U.S. 213 (1967), and many states have adopted statutes similar to the federal one. At trial itself, of course, defendants enjoy a number of important protections, including the right to be tried in their own presence and to defend in person, to be represented by counsel, to confront the witnesses against him or her, to the assistance of an interpreter if necessary, protection against self-incrimination, and of review of conviction and sentence by an independent court.

D. Conditions of detention

138. As indicated above, the constitutional prohibition against cruel and unusual punishments applies not only to punishments imposed by statute or pursuant to the sentence of a court but also to prison conditions and the treatment to which a sentenced prisoner is subjected. Prisoners may not be denied an "identifiable human need such as food, warmth, or exercise". Rhodes v. Chapman, 452 U.S. 337 (1981).

139. Prisoners must be provided "nutritionally adequate food, prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it". Ramos v. Lane, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). Prisoners must also be provided medical care, although an inadvertent failure to provide medical care does not rise to the level of a constitutional violation; rather, it is a prison official's "deliberate indifference" to a prisoner's serious illness or injury that constitutes "cruel and unusual" punishment. Estelle v. Gamble, 429 U.S. 97 (1976). Several federal statutes also provide protection to sick and disabled inmates. See, e.g., the Americans with Disabilities Act,

codified at 42 U.S.C. §§ 12101-12213 (which prevents discrimination against qualified individuals on the basis of their disabilities); the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794.

140. Prison officials have a duty to protect prisoners from violence inflicted by fellow prisoners. Hudson v. Palmer, 468 U.S. 517 (1984). Because prisons are inherently dangerous places, prison officials are responsible (liable) to victims only if they have prior knowledge of imminent harm. In Vosberg v. Solem, 845 F.2d 763 (8th Cir. 1988), plaintiffs in a South Dakota state prison complained that a number of institutional policies resulted in their being victimized, including a pass system that permitted young inmates to be alone with older inmates, "double-celling" violent and non-violent inmates, and positioning guards where they could not see inside prisoners' cells. The court concluded that the prison policies were directly responsible for the ensuing violence, thereby giving rise to a violation of the Eighth Amendment and liability for damages and attorneys fees.

141. Finally, prisoners must not be subjected to excessive use of force. Force may be applied only "in a good faith effort to maintain or restore discipline" and may not be used "maliciously and sadistically to cause harm". Whitley v. Abers, 475 U.S. 312 (1968).

142. In all criminal correctional systems, the policies and practices of prison staff are governed by official regulations designed, inter alia, to afford humane and dignified treatment to prisoners. The correctional community is aware of, and in general subscribes to, the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials.

143. Disciplinary measures. As a matter of federal constitutional law, the concept of due process guarantees inmates certain rights regarding the imposition of disciplinary or punitive measures while in confinement. These include, for example, advance written notice, the opportunity to call witnesses and present evidence, and a written statement of reasons and findings. Wolff v. McDonnell, 418 U.S. 539 (1974); Meachum v. Fano, 427 U.S. 215 (1976); Sandin v. Conner, 515 U.S. 472 (1995). State law in some cases provides greater protection than these federal constitutional guarantees. See, e.g., McGinnis v. Stevens, 543 P.2d 1221 (Alaska 1975).

144. Special security measures. Within the constraints of the Eighth Amendment, convicted prisoners may be subjected to special security measures and segregation from the general prison population only in limited circumstances necessary to maintain the safety and security of the inmates or staff of an institution. Prisoners are entitled to due process protections in the application of these measures and to a federal remedy when the conditions violate the standards of the Eighth Amendment.

145. In November 1994, the Federal Bureau of Prisons activated the Administrative Maximum Security Institution (ADX) in Florence, Colorado. The mission of this facility is to confine the most dangerous and aggressive inmates in the Federal Prison System, along with a number of state offenders who also present extreme management problems. Such offenders have been designated to ADX Florence because their assaultive, predatory, or escape-related behaviour is so serious that it would be unsafe to house them in traditional, open population institutions of

lesser security. Administrative maximum security operations, however, are no more stringent than necessary to ensure the safety of the public, Bureau staff, and other inmates. To date, there has been no litigation regarding the general conditions of confinement at ADX Florence.

146. Various non-governmental groups have expressed concerns about conditions in the so-called "super maximum security" facilities which have been established in some state systems. In January 1995, a U.S. District Court found conditions at the Security Housing Unit in the California State Department of Corrections' Pelican Bay facility to be in violation of the United States Constitution. The court held specifically that (1) there was unnecessary and wanton infliction of pain and use of excessive force; (2) prison officials did not provide inmates with constitutionally adequate medical and mental health care; (3) conditions of confinement in the security housing unit, which included extreme isolation and environmental deprivation, did not inflict cruel and unusual punishment on all inmates, but conditions in that unit did impose cruel and unusual punishment on mentally ill prisoners; (4) some procedures used to validate inmates as gang members and thus transfer them to the unit violated due process; and (5) a special master would be appointed. Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).

147. The Civil Rights Division of the Department of Justice also conducted an investigation of the Maryland State "supermax" facility and, in May 1996, issued a letter of findings to the State. The letter advised the State of several constitutional violations, including violations relating to the medical and mental health care being provided to the prisoners. The State instituted remedial measures and, as a result, in September 1998 the Civil Rights Division closed its investigation.

148. Visitation. Access to convicted prisoners is largely regulated by state law and within the discretion of the prison administrators; there is no federal constitutional or statutory right to visit convicts in prison. However, access is provided to a prisoner's counsel or legal representative, Souza v. Travisono, 368 F. Supp. 459 (D.R.I. 1973), aff'd. 498 F.2d 1120 (1st Cir. 1974), and it is the norm for administrators to encourage family members and friends to visit inmates, subject to reasonable restrictions to ensure orderliness and security. Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989); Meachum v. Fano, 427 U.S. 215 (1976). The federal Bureau of Prisons does so by regulation, 28 C.F.R. § 540.40. Some state correctional systems allow conjugal visits. Access by the clergy, the press, concerned non-governmental organizations and other non-family members and the general public is likewise permissible, subject only to reasonable restrictions.

149. Medical or scientific experimentation. With one limited exception discussed below, non-consensual medical experimentation is illegal in the United States. Specifically, it implicates the Fourth Amendment's proscription against unreasonable searches and seizures by the government (including seizing a person's body), the Fifth and Fourteenth Amendments' proscription against depriving one of life, liberty or property without due process, the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment, and state and common law proscriptions against criminal and civil assault and battery.

150. Seventeen federal agencies have adopted a single, general set of regulatory provisions which prohibit, with limited exceptions, non-consensual participation by human subjects in medical research. See 45 C.F.R. Part 46. Origins of this rule lie in the National Research Act of 1974, which established a National Commission for the Protection of Human Subjects of

Biomedical and Behavioral Research, whose recommendations (known as the "Belmont Report") were published in April 1979, and in the recommendations made by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research in 1981. The protective regulations implementing this "Common Rule" mandate led to consent procedures and standards for any research involving human subjects that is conducted, supported, or regulated by any of the federal agencies. Included in these procedures is a required review of the proposed study by an Institutional Review Board composed of experts familiar with the proposed research, at least one individual who is not a scientist, and one individual who is not affiliated with the institution conducting the research. The Board must also scrutinize the informed consent documents to ensure that they meet the relevant regulatory standards. Additional protections are mandated for pregnant women, fetuses, human in vitro fertilization, children, and prisoners who participate in medical research.

151. One limited exception to the prohibition against non-consensual medical research permits research on individuals in need of emergency therapy who cannot give legally informed consent because of their medical condition and because no legally authorized representative is available to give consent on their behalf. The Secretary of Health and Human Services waived the regulatory requirement for obtaining and documenting informed consent for this limited class of research participants, permitting an Institutional Review Board to review and approve research concerning emergency therapies and to review the waiver of informed consent. See 61 Fed. Reg. 51531-33 (2 October, 1996); see also 21 C.F.R. § 50.24. The waiver does not permit emergency therapy research involving pregnant women, fetuses, human in vitro fertilization, or prisoners.

152. The Federal Government promotes continued attention and education in this field in a variety of ways. For example, the National Institutes of Health requires MD/PhD students in various federally supported educational programmes to take a course in "Scientific Integrity and the Responsible Conduct of Research". The National Bioethics Advisory Commission, established by Executive Order No. 12975 (3 October, 1995), is charged with identifying broad principles to govern the ethical conduct of research, including particularly in the management and use of genetic research, and reviewing the appropriateness of federal agency policies, guidelines and regulations relating to bioethical issues arising from research on human biology and behaviour.

153. While prisoners are generally free to consent to any regular medical or surgical procedure for the treatment of their own medical conditions, their consent must be "informed." However, prison regulations do not, as a rule, permit prisoners to participate in medical and scientific research. For example, the Federal Bureau of Prisons prohibits medical experimentation or pharmaceutical testing of any type on all inmates in the custody of the Attorney-General who are assigned to the Federal Bureau of Prisons. See 28 C.F.R. § 512.11(c). When not otherwise prohibited by law, medical research on prisoners may be conducted in accordance with human subjects protection regulations and using special informed consent protections and procedures mandated for prisoners. See 45 C.F.R. Part 46, Subpart C.

154. Within the broader correctional community, similar standards have been developed strictly limiting the types of research conducted in prisons, even with an inmate's consent. In its mandatory requirements for institutional accreditation, for example, the American Correctional Association stipulates that:

"Written policy and practice prohibit the use of inmates for medical, pharmaceutical, or cosmetic experiments. This policy does not preclude individual treatment or an inmate based on his or her need for a specific medical procedure that is not generally available."

155. Generally, the involuntary administration of antipsychotic medication deprives an inmate of a constitutionally-deprived liberty interest and may also infringe upon the inmate's rights under state law. If the inmate has a serious mental illness, poses a threat to himself or others, and treatment is determined to be in his medical interest, however, such drugs can lawfully be administered. Washington v. Harper, 494 U.S. 210 (1990).

Article 3: Non-refoulement

156. The United States recognizes its obligation not to "expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture". The Department of State and the Department of Justice are the agencies charged with duties that may implicate article 3 obligations. The Immigration and Naturalization Service (INS), an agency within the Department of Justice, is responsible for ensuring compliance in the context of removal (formerly deportation or exclusion) of aliens illegally present in the United States, and the Department of State is responsible for ensuring compliance in the extradition context.

157. Generally, expulsions and returns of aliens from the United States are governed by the substantive and procedural rules set forth in the Immigration and Nationality Act (INA). The process of extradition is based on bilateral extradition treaties and is governed by other federal statutes. Thus, the requirements of article 3 implicate two separate and largely distinct bodies of domestic law. In FY 1998 approximately 171,154 aliens were removed from the United States, 38 persons were formally extradited from the United States, and an additional 28 persons were surrendered pursuant to waivers of extradition.

158. United States understanding. Guidance for ensuring compliance with article 3 may be found by comparing its provisions to article 33 of the 1951 Convention relating to the Status of Refugees (Refugee Convention) and to the 1967 Protocol to the Refugee Convention, to which the United States is a party. Article 33 provides that "no Contracting Party shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion". The United States currently implements article 33 of the Refugee Convention through the withholding of removal provision in section 241 (b) (3) of the INA. That provision, as interpreted by the courts, requires that the Attorney-General withhold an alien's removal to a country where it is more likely than not that an alien's life or freedom would be threatened on account of one of the five grounds mentioned above. INS v. Stevic, 467 U.S. 407 (1984). In order to clarify the meaning of "substantial grounds" in article 3, the United States conditioned its ratification on the understanding that the phrase "where there are substantial grounds for believing that he would be in danger of being subjected to torture", means "if it is more likely than not that he would be tortured".

159. INS and the removal of aliens. Removal proceedings, through which it is determined whether an alien should be removed from the United States, are considered civil rather than

criminal proceedings. Depending on the circumstances in individual cases, aliens subject to removal proceedings may be accorded a range of statutory and regulatory procedural rights, including access to legal representation, a hearing before an immigration judge, the right to appeal an adverse decision to the Board of Immigration Appeals, and the right to seek review of certain decisions in a federal court. In addition, certain classes of aliens in removal proceedings may designate the country to which they will be ordered removed.

160. An alien may seek several types of protection from removal to a country where he or she fears harm, including asylum and withholding of removal. While these two remedies differ in procedure and effect, they both rely on a determination that the alien is at risk of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion". INA Sections 208 and 241 (b).

161. It can be expected that in many cases where an alien's return to a particular country would be prohibited by article 3, the alien might also satisfy the requirements for asylum or withholding of removal. There are, however, some important differences between asylum and withholding of removal, on the one hand, and article 3 on the other hand. First, consistent with article 33 of the Refugee Convention, several categories of individuals, including persecutors, persons who have committed particularly serious crimes, persons who are believed to have committed serious non-political crimes before arriving in the United States, persons who pose a security danger to the United States and certain terrorists are ineligible for asylum and withholding of removal. Immigration and Nationality Act §§ 208 (b) (2) (A) (i-v) and 241 (b) (3) (B). Article 3 does not exclude such individuals from its scope. Second, asylum and withholding of removal are available only to aliens at risk of persecution on account of the specific characteristics enumerated by the statute. Article 3 encompasses persons who would be tortured even if the torture were not motivated by one of the protected characteristics. Third, the definition of torture does not encompass all types of harm that might qualify as persecution under the asylum and withholding laws. In this regard, the scope of the asylum and withholding laws is greater than that of article 3. Thus, the coverage of the Convention against Torture is different from that provided by statutory provisions for asylum and withholding of removal.

162. Observance of article 3 obligations in the removal context. Prior to its adoption of formal regulations (see below), the INS adopted a comprehensive interim administrative process to assess the applicability of article 3 to individual cases of aliens subject to removal. Under this process, if there were reason to believe that an alien would be tortured in a particular country after all removal proceedings had been completed and before a final order of removal was executed, the INS would consider whether article 3 prohibited the alien's removal to that country. The INS took an inclusive approach to identifying cases to be examined under article 3, allowing aliens to raise this issue at any point in the removal process. If an alien or his attorney or representative requested protection under article 3 or expressed a fear of torture at any time before removal, the INS assessed the case under article 3. In addition, the INS worked with the United Nations High Commissioner for Refugees to develop an informal process under which that agency could bring to the Government's attention cases which it believed raised issues under article 3.

163. Specifically, under this administrative process, if the removal process were already under way when the case came to the Government's attention, removal would be suspended until a

determination under article 3 was made. If the alien raised this issue at an earlier stage in the process, the INS would postpone making an article 3 determination until after the alien had exhausted all other avenues for seeking relief from removal and had been finally ordered removed to a place where there is reason to believe he may be tortured. This approach allowed the INS to address the applicability of article 3 to an individual case only when actually necessary to ensure compliance with the Convention. It also allowed an individual alien to pursue fully any other more extensive benefits or protections, such as asylum or withholding of removal, for which he might have been eligible.

164. Once a final removal order had been issued in a case that might have involved obligations under article 3, a specially trained administrative "asylum officer" conducted an interview with the alien regarding the possibility that he would be tortured if deported to the country of removal. Asylum officers receive extensive and ongoing training about country conditions and human rights practices around the world, about how to make detailed assessments of the risk of harm to an alien in a particular country, and about interviewing techniques. The results of the asylum officer interview were forwarded to the Department of State for an opportunity to comment on the applicability of article 3 in light of the conditions in the country in question. After evaluating all the evidence collected, the INS determined whether the alien's removal to the country would violate United States obligations under article 3. If it was determined that the alien could not be removed to that country consistent with article 3, the INS exercised its existing discretionary authority to ensure that the alien was not removed there. See INA Section 103 (a); 8 CFR Section 2.1. The INS remained free under article 3, of course, to remove the alien to any country where he would not be tortured.

165. Observance of article 3 obligations in the extradition context. Prior to its issuance of regulations on the subject (see below), the Department of State relied on the law and practice of the United States to provide authority for declining to extradite a fugitive to another State party where there are substantial grounds to believe he would be in danger of being subjected to torture.

166. Under United States law, extradition from the United States to another country can only take place pursuant to the provisions of a duly ratified extradition treaty. At present there are only three narrow exceptions to this requirement: (i) extradition to the international tribunals for the former Yugoslavia and Rwanda; (ii) extradition of non-United States nationals who have committed crimes of violence against United States nationals in foreign countries in certain circumstances, see 18 U.S.C. § 3181 with note, § 3184; and (iii) extradition to Palau, . the Marshall Islands and the Federated States of Micronesia pursuant to a legislative executive agreement. Few if any such treaties explicitly provide for denial of requests for extradition on the grounds that an individual would be in danger of being tortured. However, domestic law grants the Secretary of State discretion to decide whether to surrender a fugitive who has been found extraditable. See 18 U.S.C. §§ 3184, 3186. This is a sufficient basis for the Secretary, who is for these purposes the "competent authority" within the meaning of article 3, to satisfy herself before she orders the surrender of the fugitive that he or she will not be tortured after extradition. Some bilateral treaties also contain provisions for denial of extradition on humanitarian grounds or where there is a substantial basis for believing that the extradition request has been made for the purpose of prosecuting or punishing the person sought on account of that person's race, religion, nationality or political opinion.

167. To comply with the Convention's requirements in the extradition context, the Department of State instituted a process for the consideration of all claims related to article 3 in the context of the Secretary's consideration of extradition requests. Once a fugitive has been found extraditable by a United States judicial officer, an extradition decision is presented to the Secretary of State. Where the fugitive makes allegations relating to torture, appropriate policy and legal offices review and analyse information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant. Even where the fugitive has made no claims, consideration is given to the requesting country's human rights record, as set forth in the United States annual country conditions reports, from the perspective of article 3. Based on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions. The Secretary's decision is a matter of executive discretion and is not subject to judicial review.

168. Legislation. On 21 October 1998, President Clinton signed into law a bill which required "[n]ot later than 120 days after the date of enactment of this Act, the heads of appropriate agencies [to] prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention". Section 2242, Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105-277 (21 October 1998). Accordingly, the INS and the Department of State each promulgated regulations to implement article 3, consistent with United States reservations, understanding and declarations, in their respective areas of responsibility.

169. INS Regulations. On 19 February 1999 the Department of Justice published an interim rule prescribing regulations that implement formally, as directed by the Congress, United States obligations under the Convention against Torture. The interim rule became effective on 22 March 1999. (A full text of the rule is at annex IV.)

170. Under the regulations, at 8 C.F.R. Parts 3, 103, 208, 235, 238, 240, 241 and 253, claims for article 3 protection generally are determined by Immigration Judges (IJs) of the Executive Office for Immigration Review (EOIR). The regulations permit aliens to raise article 3 claims during the course of regular immigration removal proceedings, providing the opportunity for prompt and fair consideration. IJ decisions are subject to review by the Board of Immigration Appeals, also a part of EOIR.

171. The regulations create two types of article 3 protection. The first is a new form of withholding of removal. The second protection is deferral of removal, a more temporary form of protection, which is to be granted to aliens who would more likely than not face torture, but who are ineligible for withholding of removal - for example, certain criminals, terrorists and persecutors. Deferral of removal is more easily and quickly terminated if the individual is no longer likely to be tortured in the country of removal. A deferral order would not alter INS authority to detain an individual subject to detention. Neither provision alters the Government's ability to remove the individual to a third country where he or she would not be tortured. Both, however, would ensure compliance with the cardinal obligation of article 3, not to return the person to the likelihood of torture.

172. The regulations do not apply to cases in which the INS had made a final decision under the prior administrative procedures. Those already granted protection are considered to have been granted either withholding or deferral of removal, whichever is appropriate to the circumstances of the case. Persons who had been ordered removed by an IJ and who had article 3 claims pending with INS under the prior procedures were sent notices that the interim process was ending and that they should file a motion to reopen with EOIR to seek consideration of the claim, which motions would be granted automatically. To provide a reasonable opportunity to file such a motion, the notice also provided an automatic 30-day stay of removal.

173. Those who did not have article 3 claims pending with INS and who had been ordered removed before the effective date of the regulations did not receive an automatic stay. However, they enjoyed a 90-day window to file a motion to reopen with EOIR. During this 90-day period, such motions were exempted from the usual requirement that a motion to reopen be supported by previously unavailable evidence.

174. For certain persons, such as those arriving at ports of entry, those who illegally re-enter the United States after being ordered removed, and certain criminal aliens, Congress has established special, streamlined removal procedures. These special procedures operate outside the normal IJ hearing process. In these special cases, the regulations provide for screening by specially trained asylum officers of individuals who claim they would be tortured to quickly identify and adjudicate meritorious claims and to weed out clearly non-meritorious and frivolous claims. People who meet the screening standard will have their claims considered by an IJ, while people who do not will be removed expeditiously, as Congress intended. Those who pass the screening process and have their claims adjudicated by an IJ have the right to appeal a negative IJ decision to the Board of Immigration Appeals. Those who do not pass the screening process have the right to seek review by an IJ of the asylum officer's negative screening determination. Thus, even those subject to these expedited processes are able to seek reconsideration of any negative decision. Aliens who are removed as terrorists or because of certain security-related grounds are also subject to special removal procedures. Any article 3 claim by such an alien will be considered through the administrative process by which INS issues and executes the removal order.

175. The regulations also provide for the possibility that, in rare cases, the United States may seek a diplomatic solution to an article 3 claim by negotiating assurances against torture from the Government in question. It is anticipated that such an approach would be taken only in unusual cases. The nature and reliability of any such assurances would be carefully assessed by the Attorney-General in consultation with the Secretary of State.

176. Department of State regulations. On 26 February 1999 the Department of State published a final rule, as directed by the Congress, issuing regulations implementing the Convention against Torture in extradition cases. The rule became effective immediately. (A full text of the rule is in annex V.)

177. Under these regulations, at 22 C.F.R. Part 95, the Department of State has essentially codified its pre-existing practice, see above, for ensuring that the United States does not extradite a person to a country where it is more likely than not that he will be subjected to torture.

Article 4: Torture as a criminal offence

178. Throughout the United States, its territories and possessions, all acts constituting torture are criminal offences, punishable by appropriately severe penalties. Additionally, acts constituting attempts, "complicity", "participation" and conspiracy to torture are likewise criminal offences. No single federal statute specifically defines or prohibits torture or directly implements the central provisions of the Convention. Nonetheless, at the time of ratification, it was determined that existing state and federal law was sufficient to implement article 4, except to reach torture occurring outside United States jurisdiction, as discussed below under article 5.

179. Where acts constituting torture under the Convention are subject to federal jurisdiction, they fall within the scope of such criminal offences as assault, maiming, murder, manslaughter, attempt to commit murder or manslaughter, or rape. See 18 U.S.C. §§ 113, 114, 1111, 1113, 2031. Conspiracy to commit these crimes, and being an accessory after the fact, are also crimes. See 18 U.S.C. §§ 3, 371 and 1117. Where such acts are committed within the "special maritime and territorial jurisdiction" located within a state, federal law incorporates criminal defences as defined by state law. See 18 U.S.C. §§ 7, 13.

180. Conduct falling within the scope of the Convention will often constitute criminal violations of the federal civil rights statutes. For example, violations of 18 U.S.C. §§ 241 and 242 carry a maximum of 10 years in jail or, if the victim dies, the death penalty. Section 241 penalizes conspiracies to deprive an individual of "the free exercise or enjoyment of a right of privilege secured by the Constitution or laws of the United States". Section 242 addresses wilful deprivation of such rights "under color of law".

181. It has long been recognized that these statutes apply to official misuse of authority and force. In the notorious Rodney King case, two officers of the Los Angeles Police Department were convicted of violating § 242 by beating Mr. King repeatedly with batons during an arrest. Each was sentenced to 30 months' imprisonment for criminal violations of the civil rights statutes. This case began as a local prosecution of the four police officers involved in the incident - they were acquitted of the charges after the defence convinced the jury that their conduct was not unreasonable under all the surrounding circumstances. The subsequent federal criminal prosecution was successful in convincing a federal jury that the principal actor used unreasonable force, and his supervising sergeant had permitted him to do so. See United States v. Koon, 518 U.S. 81 (1996).

182. Even where a specific act constituting torture is not within the scope of these federal statutes, or is outside the protections afforded by the Fourth, Fifth, Eighth and Fourteenth Amendments, it will be found in violation of state criminal law. Every state criminalizes deliberate acts of bodily injury as well as abuses of authority on the part of state agents, whether as common assault and battery, homicide, rape, etc., as well as conspiracies, attempts, complicity, solicitation, etc. Twenty-two states have "official oppression" statutes, many of which are patterned after the American Law Institute's Model Penal Code section 243.1, which provides that a person acting or purporting to act in an official capacity commits a crime if he or she knowingly subjects another to arrest, detention, search, seizure, ill-treatment, dispossession, assessment, lien or other infringement of personal or property rights or denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity. The Oregon

state penal code, for example, includes a specific crime of official misconduct. See also, Alaska Stat. 11.56.850 (1997) ("official misconduct"); Col. Crim. Code C.R.S. 18-8-403 (1996); Georgia OCGA 45-11-3 (1997); N. Dak. Cent. Code 12.1-14-01 (1997); Oreg. Stat. 163.205 (2) (1997); Tenn. Code Ann. 8-18-101 (1997).

Article 5: Jurisdiction

183. As a general matter, criminal jurisdiction under federal and state law is territorial. It encompasses crimes committed by any person within the territory of the United States (or relevant subordinate jurisdiction) regardless of the nationality or citizenship of the offender or victim.

184. In relatively few instances, the definition of "territory" has been specifically crafted to apply to acts taking place outside United States geographical territory. For example, certain provisions of the federal criminal code apply within the "special maritime and territorial jurisdiction of the United States" (18 U.S.C. § 7), which includes, inter alia, vessels registered in the United States, aircraft belonging to the United States, and "any place outside the jurisdiction of any nation with respect to an offence by or against a national of the United States". Federal law also defines the "special aircraft jurisdiction of the United States" to include extraterritorial offences against aircraft in specified instances. See 49 U.S.C. § 46501 (2).

185. For instance, United States criminal jurisdiction extends beyond the territory of the United States to the following conduct:

- criminal acts which occur on a vessel belonging to a United States individual or corporation located on the high seas. 18 U.S.C. § 7 (1).

- criminal acts which occur on an aircraft belonging to a United States individual or corporation flying over the high seas. 18 U.S.C. § 7 (5).

- criminal acts performed by or against a United States national outside the jurisdiction of any country. 18 U.S.C. § 7 (7).

- criminal acts which occur on any foreign vessel with a scheduled departure or arrival in the United States and the criminal act is performed by or against a United States national. 18 U.S.C. § 7 (8).

- criminal acts performed on an aircraft with its next scheduled destination or last place of departure in the United States, if it next lands in the United States. 49 U.S.C. § 46501 (2) (D) (i).

- criminal acts performed on an aircraft leased (without a crew) to a United States lessee with its principal place of business in the United States. 49 U.S.C. § 46501 (2) (E).

186. These provisions meet the obligation of the United States under article 5 to establish jurisdiction over acts of torture when committed "in any territory under its jurisdiction or on board a ship or aircraft registered in" the United States.

187. Extraterritoriality. At the time the United States signed the Convention against Torture, neither federal nor state law was sufficiently far-reaching to satisfy the additional requirements of article 5 concerning jurisdiction over acts of torture by United States nationals wherever committed or over such offences committed elsewhere by alleged offenders present in United States territory whom the United States does not extradite.

188. To correct this deficiency before ratification, the United States enacted a new provision of the federal criminal code in 1994. This statute, which is codified at Chapter 113B of Title 18 of the United States Code (copy in annex II) provides federal criminal jurisdiction over an extraterritorial act or attempted act of torture if (1) the alleged offender is a national of the United States or (2) if the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender. See 18 U.S.C. §§ 2340 and 2340A, Pub. L. 103-236, Title V, § 506 (a), as amended by Pub. L. 103-322, Title VI, § 60020, Pub. L. 103-415, § 1 (k), and Pub. L. 103-429, § 2 (2). The statute defines "torture" in a manner compatible with the United States reservations to the Convention. Offences are punishable by fines or imprisonment up to 20 years (or, if death results from the prohibited conduct, by death or imprisonment for any term of years or life). This statute does not displace or preclude application of state or local law.

189. This statute took effect on 21 October 1994; no prosecutions have been initiated by the United States under this provision to date.

Article 6: Detention and preliminary inquiry in cases of extradition

190. Federal law and bilateral extradition treaties authorize officers to take an alleged or suspected offender into custody and hold him until extradition proceedings are under way as required by article 6.

191. Ordinarily, the apprehension and detention of a suspected torturer for purposes of extradition requires issuance of an arrest warrant by a federal district court judge or magistrate judge. In exigent circumstances (e.g., when a suspect is identified trying to enter or leave the country at a port of entry) an arrest may be made without a warrant and the suspect detained in accordance with normal procedure. The ordinary requirements for an initial appearance before a magistrate apply in such a situation; however, as a general matter, in United States practice bail is not granted to persons pending extradition. The detainee may of course seek judicial review of the detention by petitioning for a writ of habeas corpus.

192. With reference to the provisions of article 6 (3), ordinary rules of consular notification apply.

Article 7: Extradite or prosecute ("Aut dedere aut judicare")

193. In cases where an alleged torturer has been found within United States territory and the United States does not extradite him or her, article 7 requires that the case be submitted to competent authorities "for the purpose of prosecution". This aut dedere aut judicare obligation, comparable to provisions in other multilateral conventions such as the Conventions on Aircraft

Hijacking and Sabotage, Maritime Terrorism, Internationally Protected Persons, and Hostage Taking, is specifically addressed by the implementing legislation discussed under article 5 above.

194. The United States has criminal jurisdiction to prosecute an individual for torture committed within its territory by authority of a number of federal and state laws. In addition, section 2340A of Title 18 provides for punishment of acts of torture committed outside the United States by a United States national or by a person subsequently present in the United States. The definition of torture set forth in section 2340 conforms to the definition in the Convention, as interpreted by the understandings expressed by the United States at the time of ratification. In sum, in such circumstances, prosecution can be initiated under United States law in a manner consistent with the obligations set forth in article 7. Indeed, the U.S. Department of Justice has undertaken measures to ensure that any person on United States territory believed to be responsible for acts of torture is identified and handled consistent with the requirements of this provision.

Article 8: Extraditable offences

195. Pursuant to article 8, any act of torture within the meaning of the Convention is now an extraditable offence under relevant United States law and extradition treaties with countries that are also party to the Convention. The United States has undertaken to include such offences, directly or indirectly, in every extradition treaty it negotiates in the future.

196. International extradition is a matter of federal law. See 18 U.S.C. §§ 3181-3196. As discussed above, under United States law the United States generally cannot extradite in the absence of an extradition treaty. For this reason, the United States will not avail itself of the permissive provision in article 8 (2) to consider the Convention against Torture itself as the legal basis for extradition.

197. Historically, the United States had preferred to specify the particular extraditable offences in each extradition treaty with a foreign nation. The typical method for doing so involved listing each of the covered offences in an annex to the treaty. More recently, however, United States practice has departed from this "list" approach. The United States now prefers to enter into treaties that obligate the States parties to extradite individuals for those offences which constitute a crime in both States and for which the penalty is deprivation of liberty for more than one year or a more severe penalty. This "dual criminality" approach automatically encompasses newly codified crimes such as torture and has proven to be more flexible and effective in bringing to justice criminals who are involved in criminal activities such as money-laundering, narcotics trafficking, white-collar crime and organized crime. Under the "dual criminality" approach it is not necessary specifically to incorporate the offence of "torture" into existing bilateral treaties or those to be negotiated in the future so long as torture or the acts constituting torture are offences in both countries.

198. To date, there have been no cases of extradition to another country for torture or torture-related offences. The United States can extradite a person for an offence that would constitute torture to a State which is not a party to the Convention if the offence is on the "list" or (in the event of a "dual criminality" treaty) if the crime is punishable by a penalty of more

than one year's incarceration in both countries. With regard to States which are party to the present Convention but which do not have a bilateral extradition treaty with the United States, the United States has the following options where other criteria are met: removal under the terms of the Immigration and Nationality Act, prosecution within the United States, or in the case of a non-national who committed a crime of violence against United States nationals outside the United States, extradition pursuant to 18 U.S.C. section 3181 (b). In the case of Rwanda or the former Yugoslavia, the United States could also extradite to the respective International Criminal Tribunals.

199. The Convention against Torture has been cited in relatively few extradition cases to date. One is In Matter of Extradition of John Cheung, 968 F. Supp. 791 (D.Conn. 1997). Cheung contested extradition to Hong Kong, inter alia, on the ground that if extradited to Hong Kong, he would be subjected to torture or inhuman treatment in violation of articles 6 and 14 of the International Covenant on Civil and Political Rights and article 3 of the Convention against Torture. The United States magistrate supervising the extradition hearing held that Cheung had failed to make a sufficient factual showing that he would be singled out for torture or death in Hong Kong, noting in any event that it is the U.S. Secretary of State who has statutory authority to determine whether extradition should be denied in a given case on humanitarian grounds. This role of the Secretary of State is the basis for the judicial rule of "non-inquiry", which prohibits the extradition magistrate from taking into account the possibility that the extraditee will be mistreated if returned. See also Ahmad v. Wigen, 910 F.2d 1063, 1066 (2d Cir. 1990).

200. Under United States law, the so-called "political offense" exception to extradition would not be available to an individual accused or convicted of torture within the meaning of the Convention. The reasons are twofold. First, United States law requires application of the "incidence" test in judging whether a specific act of violence constitutes a "relative" political offence. Ahmad v. Wigen, 726 F. Supp. 389, 401-408 (E.D.N.Y. 1989). Under this rule, the act in question must be the incidental result of an act directed against a permissible target in the context of a civil war, insurrection, or uprising. There is no permissible target for an act of torture in any context. Second, new extradition treaties now exclude from the political offence exception those acts for which both States have the obligation to extradite the person sought or to submit the case to their competent authorities for the purpose of prosecution under multilateral treaties such as the Convention against Torture.

Article 9: Mutual legal assistance

201. United States law permits both law enforcement authorities and the courts to request and to provide many forms of "mutual legal assistance" in criminal cases covered by the provisions of the Convention against Torture. The forms of possible assistance include the service of documents, the taking of testimony, provision of documents, execution of requests for searches and seizures, transfer of persons in custody, and forfeiture of assets, to name a few.

202. Statutory authority for the United States to act upon such requests from foreign countries is codified at 28 U.S.C. section 1782. As amended in 1996, U.S. law authorizes the appropriate federal district courts to order a person to give testimony or provide documents for use in "a proceeding in a foreign or international tribunal, including criminal investigations conducted

before formal accusation". United States law does not prohibit voluntary cooperation with foreign criminal proceedings. A person may not, however, be compelled to give testimony or produce a document in violation of any legally applicable privilege.

203. As of the end of 1998, the United States had entered into 22 bilateral treaties and dozens of bilateral agreements with other countries to establish closer and more effective law enforcement cooperation and to increase the availability of admissible evidence in criminal investigations and proceedings. An additional 19 bilateral mutual legal assistance treaties were ratified by the United States during December 1998 and January 1999. Some of these treaties and agreements require dual criminality in the subject offences, others do not; but all cover a wide range of criminal offences, and all would permit the sharing of evidence and other forms of assistance in respect of the crimes covered by the Convention against Torture. Such treaties are considered self-executing and supersede any inconsistent pre-existing statutory domestic law. In re Erato, 2 F.3d 11 (2d Cir. 1993).

204. The United States has signed the Inter-American Convention on Mutual Legal Assistance in Criminal Matters, which was transmitted to the Senate for its advice and consent to ratification in 1997. Since that Convention is not yet in force for the United States, no requests for mutual assistance have been executed pursuant to its terms.

205. Also on the multilateral level, the United States played a substantial role in the establishment by the United Nations of the two ad hoc International Criminal Tribunals (for the Former Yugoslavia and for Rwanda) and has provided significant operational support to their activities. In 1996, the mutual legal assistance statute (§ 1782) was amended to authorize assistance to the Tribunals and to foreign countries in gathering evidence for preliminary investigations as well as for prosecutions. The amendment ensured that several earlier federal court of appeals decisions limiting the use of that provision in preliminary stages of foreign investigations would not interfere with the United States obligation to provide assistance to the Tribunals.

Article 10: Education and Information

206. The United States Government attaches great importance to the task of providing education and information regarding the prohibition against torture to persons who may be involved in the custody, interrogation, and treatment of persons arrested, detained or imprisoned. Indeed, in furtherance of the goals of education and information, this report has been posted on the U.S. Department of State web page: **<http://www.state.gov>**.

207. Educational Outreach. Copies of the Convention have been sent to the Attorneys-General of each of the 50 states and other constituent governmental units of the United States, with a request that they be further distributed to relevant officials. Once the present report has been published, copies will be available to libraries, schools, and interested citizens through the U.S. Government Printing Office (GPO).

208. The Department of State is in the process of increasing the amount of information about human rights issues available on its web page: **<http://www.state.gov>**. The web page provides information about all aspects of the Department's work, including human rights issues,

speeches given by departmental officials, and the annual "human rights" country conditions reports. In addition, this report will be posted on the Department's web page. Our goal is to enhance the human rights portion of the web page to include links to the texts of human rights treaties and other documents available on the Internet, including the current Convention.

209. Training. All federal law enforcement and corrections officers receive mandatory training in the proper treatment of individuals in custody, which includes specific information regarding the prohibition against torture, excessive use of force, impermissible methods and techniques of interrogation and restraint, cultural sensitivity and diversity, and other issues relevant to compliance with the Convention.

210. The Federal Bureau of Prisons requires each new permanent employee (and certain designated temporary employees) to complete two weeks of familiarization training in proper correctional practices. In addition, each new permanent employee must complete a 120 hour (three week) course denominated "Introduction to Correctional Techniques" at the Federal Law Enforcement Training Center in Glynco, Georgia. This training includes review and testing in Bureau of Prisons policy, firearms proficiency and self-defence. Each employee stationed at a Bureau institution must receive 40 hours of refresher training in these subjects each year.

211. Many law enforcement agencies rely on screening techniques to identify applicants and officers/agents who may be disposed to, or are at risk of, using excessive force through psychological methods; many also employ psychologists in order to monitor, train, counsel, evaluate law enforcement personnel in an effort to prevent abuses before they occur and to address the institutional or organizational factors which may contribute to incidents of ill-treatment or excess.

212. State and local criminal justice systems have independent programmes for the training of law enforcement and corrections officers, which also cover such subjects as proper techniques of search, interrogation, use of force, and mental health issues. State police officers, for example, receive an average of over 800 hours (20 weeks) of required training. For nearly two years, all states have had "peace officer standards and training" commissions.

213. At the state and local level, correctional training and staff development programmes are supplemented by the resources of public and private agencies, local police academies, private industry, educational institutions and libraries. The National Institute of Corrections, the National Academy of Corrections, the National Institute of Justice, the Federal Bureau of Investigation and others provide managerial, specialized and advanced training for state and local corrections officials. The International Association of Directors of Law Enforcement Standards and Training (IADLEST) provides an information system for employment and training of law enforcement and correctional personnel, including model minimum state standards.

214. The American Corrections Association, a private non-profit organization dedicated to the improvement in management of American correctional agencies throughout the country, has developed a voluntary accreditation programme and nation-wide standards for correctional facilities. These criteria, which apply to about 80 percent of the state departments of corrections and youth services, as well as to facilities operated by the District of Columbia and the

U.S. Department of Justice, require all new full-time employees to receive 40 hours of initial orientation training, which should include at a minimum orientation to the purposes, goals, policies, and procedures of the institution and parent agency; working conditions and regulations; employees' rights and responsibilities; and an overview of the correctional field. This training is in addition to the first year training and on-going training required in various job categories.

215. Local governments and police officers may be liable as a matter of federal law for failing adequately to train officers on constitutional limitations on the use of force. City of Canton v. Harris, 489 U.S. 378 (1989). In Davis v. Mason Co., 927 F.2d 1473 (9th Cir. 1991), for example, four plaintiffs alleged that they had been the victims of police brutality when each was individually detained for supposed traffic violations. In each case, officers used excessive force while searching the victims. The appellate court affirmed judgement in favour of the plaintiffs, holding specifically that the trial court had been correct in instructing the jury that they could find the county government and the sheriff liable under 42 U.S.C. § 1983 for failure to train the sheriff's deputies properly.

216. During the basic training course provided to all Border Patrol Agents, the Border Patrol Academy provides a two-hour course in ethics and conduct. This course instructs Agents of their obligations toward individuals they arrest and the rights of those who are arrested. The Academy also has a four-hour course in constitutional law that instructs Agents on the civil rights of those individuals that they encounter. The Academy also provides 23 hours of instruction on statutory authority under the Immigration and Nationality Act (INA). Part of this course informs Agents of the limitations on their authority and their obligations under the INA when making arrests. Finally, the Academy provides three hours of instruction on officer integrity. This course provides instruction on an Agent's responsibilities in dealing with members of the public.

217. In the refugee context, the U.S. Immigration and Naturalization Service has established a separate corps of asylum adjudicators, all of whom are given extensive training on issues relating to torture in order to sensitize them to the unique humanitarian aspects involved in claims for refugee status based on allegations of torture. All asylum officers are required to attend the Asylum Officer Basic Training Course (AOBTC) as well as on-going in-service training. The AOBTC is approximately four weeks in length and includes, inter alia, training in international human rights law, United States asylum and refugee law, interviewing techniques, and decision-making skills. Incorporated into this course is training on interviewing survivors of torture and other severe trauma. Experts instruct the officers about the physical and psychological effects of torture, its implications for the interview, and stress/burnout that the asylum officer may experience as a result of continually interviewing individuals who may be survivors of torture.

218. In the military context, all personnel involved in custody, interrogation, or treatment of individuals subjected to any form of arrest, detention, or imprisonment receive appropriate training regarding the prohibition of torture and related maltreatment. This training is given to military police, interrogators, inspectors general and psychiatric hospital staff.

219. Through the International Criminal Investigative Training Assistance Program (ICITAP), the U.S. Department of Justice works with law enforcement organizations in various foreign countries to build democratically-based police forces which operate under the rule of law. Among the components of the ICITAP programme are a training course entitled "Human Dignity in Policing", the establishment of an independent oversight mechanism (such as an Inspector General's Office) to provide objective and impartial investigation of alleged police abuses, and training courses in techniques for interviewing witnesses and suspects, appropriate uses of force, and proper techniques for arrest and humane handling of detainees and prisoners.

220. Medical Personnel. Training in the principles of medical ethics and "standards of care" is normally a required element of the curriculum for medical doctors and other health care personnel. All health care personnel are trained in the basic obligations of the physicians' oaths (such as the Hippocratic Oath, the International Code of Medical Ethics, and the 1982 United Nations Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). The Code of Medical Ethics of the American Medical Association (AMA) has guided medical practice in the United States for over 150 years and is the generally recognized ethical standard; the AMA promotes professional discussion and exchanges of views on ethical matters, e.g., through its Institute for Ethics which was established in 1997 to perform research in a range of biomedical ethics (end-of-life care, genetics, managed care and professionalism). Other codes exist; for example, the American College of Emergency Physicians established a new code of ethics in 1997.

221. To instruct students in this field, medical educational institutions use such textbooks as Beauchamp and Childress, Principles of Biomedical Ethics (4th ed., 1994); Beauchamp and Walters, Contemporary Issues in Bioethics (4th ed., 1994); Crigger, Cases in Bioethics (2nd ed., 1993); and Levine, Taking Sides (5th ed., 1993).

222. At the federal level there exists a National Center for Clinical Ethics, which was established within the Department of Veterans Affairs in 1991 to provide a comprehensive bioethics programme to promote high ethical standards in health care for veterans.

223. Within the legal community of the United States there is a growing emphasis on medical/ethical issues. For example, specialized programmes in health law and bioethics are now widespread, including academic programmes to train medical clinicians to practice ethics consultation as a speciality as well as to prepare lawyers to practice in the field of health law. Professional associations such as the American Society of Law, Medicine and Ethics and the Association of American Law Schools' Section on Law, Medicine, and Health Care also promote the study of bioethics.

224. Legislative proposals. Partly as a result of United States ratification of the Convention, legislative proposals have been introduced and adopted in the United States Congress to improve and enhance education and training in regard to preventing and remedying instances of torture and other ill-treatment.

225. One such bill, adopted on 30 October 1998, the "Torture Victims Relief Act of 1998" (Pub. L. 105-320, 112 Stat. 3017), authorizes the President to provide assistance for the

rehabilitation of victims of torture in the form of grants to treatment centres and programmes in foreign and domestic treatment centres for victims of torture. The Act also authorizes contributions to the United Nations Voluntary Fund for Victims of Torture for fiscal years 1999 and 2000. Moreover, the Act requires that foreign service officers receive specialized training with respect to the identification of the evidence of torture, the circumstances in which it is practised, its effects, and the proper manner for interviewing victims of torture, including gender-specific training on the subject of interacting with men and women who are victims of rape or other forms of sexual violence.

226. The Act further states that it is the "sense of Congress" that the United States Permanent Representative should request the Fund to find new ways of supporting and protecting treatment centres and programmes, to use the voice and vote of the United States to support the work of the Special Rapporteur on Torture and the Committee against Torture, and to establish a country rapporteur or similar procedural mechanism where the Special Rapporteur or Committee indicates that a systematic practice of torture is prevalent.

Article 11: Interrogation techniques

227. In the United States, police interrogation of a criminal suspect is strictly regulated by court-made rules based on constitutional law. Law enforcement officers are instructed in these rules as well as in the consequences of their failure to follow them. As a result, the methods and practices of interrogation of criminal suspects, as well as the arrangements for the custody and treatment of persons subjected to arrest, detention or imprisonment, are consistently under systematic review and revision.

228. In the first instance, United States law circumscribes the power of the police and other governmental authorities to detain or arrest individuals for any reason, including for purposes of interrogation. The Fourth Amendment not only requires "probable cause" for an arrest but prohibits the use of excessive force during an arrest, investigatory stop, or other "seizure" of a person. See Graham v. Connor, 490 U.S. 386 (1989).

229. Custodial interrogation. Once a criminal suspect has been taken into custody, United States law provides several protections against physical and mental compulsion, threats, and inducements to make incriminating statements. Under the Fifth Amendment's privilege against compelled self-incrimination and the rule imposed by the U.S. Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), prior to interrogation the police must inform the suspect that he or she has the right to remain silent, that any statements he or she makes can be used against him or her in court, that he or she has the right to consult a lawyer and to have the lawyer present during interrogation, and that if he or she cannot afford a lawyer one will be appointed to represent him or her prior to questioning. These rights (commonly called "Miranda rights") ordinarily attach when the individual is first subjected to custodial interrogation.

230. Exclusionary rule. A confession or statement obtained by an officer who fails to follow these rules normally may not be used as evidence against the person who made the statement in criminal proceedings. Similarly, evidence obtained as a result of the police taking advantage of such a statement may not be used in criminal proceedings. State rules may provide more stringent restrictions for state and local law enforcement officers.

Article 12: Prompt and impartial investigation

231. As a matter of law, policy and practice, the competent authorities at all levels of Government should proceed with a thorough, prompt and impartial investigation whenever they have reason to believe that an act of torture has been committed within their jurisdiction. While such investigations are frequently instigated by complaints from alleged victims and/or by independent press stories, the authorities in each jurisdiction have a clear and independent responsibility to monitor and correct abuses on their own. Investigations of torture and other types of physical, sexual, or emotional abuse are initiated as they would be for any other serious offence, based upon the existence of reasonable grounds to believe that the abuse took place.

232. Several mechanisms exist for this purpose. Virtually all major law enforcement organizations and agencies now have an internal review mechanism (such as an inspector general or internal affairs section) and/or some form of permanent, independent oversight body (a citizens' review board or governing commission) to which complaints of ill-treatment, excessive use of force, or other irregularities can be made. The touchstone is independence of review and investigation.

233. All inmate allegations of abuse by Federal Bureau of Prisons staff, for example, are referred by the Bureau's Office of Internal Affairs to the Department of Justice's Office of the Inspector General, which then conducts an independent investigation and determines whether to refer any of the complaints to the Department's Civil Rights Division for further investigation. In some circumstances, ad hoc commissions are established to deal with specific situations requiring independent review, such as the so-called Christopher Commission established to investigate the Los Angeles Police Department after the Rodney King incident in 1991.

234. In all cases, complaints may also be made to the appropriate prosecutorial authorities, who are independent of the police and other law enforcement forces under the United States system. Prosecutors make their own decisions, frequently on the basis of complaints, about initiating investigations and filing criminal charges.

235. In the most significant cases, the Federal Government may have jurisdiction over allegations of misconduct at the state, county or local law enforcement levels. Jurisdiction can be based on criminal violations of the various civil rights statutes or on specifically tailored legislation such as the Civil Rights of Institutionalized Persons Act, which permits the Attorney-General to institute civil lawsuits against state institutions regarding the civil rights of their residents, including the conditions of their confinement and use of excessive force.

236. In addition, the Federal Government may institute civil actions pursuant to the Pattern or Practice of Police Misconduct provision of the Crime Bill of 1994, which prohibits law enforcement agencies from engaging in a pattern or practice of violating people's civil rights. By way of example, the statute allows the Civil Rights Division of the U.S. Department of Justice to investigate and seek to remedy patterns or practices of excessive force, false arrests, improper searches and seizures, and discriminatory traffic stops or pedestrian stops.

237. The Civil Rights Division has filed two "pattern or practice" lawsuits, against the Pittsburgh, Pennsylvania, and Steubenville, Ohio Police Departments and entered into consent

decrees in both cases. These decrees require comprehensive reforms in those departments' methods of supervising, training, and disciplining officers, as well as investigating the public's complaints of police misconduct.

238. Two other "pattern or practice" lawsuits, against the Columbus, Ohio Division of Police and the New Jersey State Police, have been announced but not yet filed as the Civil Rights Division and the affected jurisdictions are seeking to negotiate settlements that would be filed contemporaneously with the lawsuits. Numerous other civil "pattern or practice" investigations of police departments and sheriff's offices are ongoing. Among those that have been publicly reported are investigations of the New York Police Department (for, among other things, the Louima case), the Los Angeles Police Department, and the New Orleans Police Department.

Article 13: Right to complain

239. In all situations, all victims of torture in the United States have the right to bring a complaint and to have their case promptly and impartially examined by competent authorities. When a victim alleges that he or she has been abused by an official, the avenues of redress include the right to complain to a competent official to initiate an impartial investigation. No restrictions on who can bring such a complaint (e.g., citizens, nationals, foreigners, illegal aliens). Such complaints do not need to await a criminal verdict, nor a verdict of acquittal in the case of a person charged with a crime. The alleged failure of a correctional institution to provide inmates with an adequate administrative remedial mechanism for dealing with complaints has been the subject of federal litigation.

240. Initially, the complaint mechanism may involve an administrative proceeding. For prisoners in the custody of the Federal Bureau of Prisons, the initial route for filing a complaint or grievance is to file a complaint regarding the conditions of confinement or against a staff member with the Bureau's Administrative Remedy Program. Through this programme, a prisoner may present and appeal an issue at three levels, starting at the institutional level and proceeding through the regional level to the Central Office. See 28 C.F.R. Part 542. The Bureau of Prisons reports that, during calendar year 1998, 17,269 administrative complaints were filed at the institutional level (13.3 per cent granted); 11,106 at the regional level (6.7 per cent granted); and 4,535 at the Central Office (0.8 per cent granted).

241. Habeas corpus. The federal Constitution guarantees all detained individuals the right to petition for a writ of habeas corpus. This writ enables the independent judiciary to provide effective relief to any individual wrongfully detained in governmental custody, whether as a result of criminal or civil proceedings. In most criminal proceedings, the petitions allege some violation of constitutional standards of due process. A writ of habeas corpus may also be used to complain of unconstitutional conditions of confinement, including torture or ill-treatment. Although the federal Constitution does not foreclose statutory substitution of an alternative to habeas corpus review, that alternative must provide independent scrutiny of governmental detention., e.g., the Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. 104-208, 110 Stat. 3546 (Sept. 30, 1996). State habeas corpus provisions generally follow the same guidelines.

242. The Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1218, enacted in April 1996, requires state inmates to exhaust all available remedies at the state level before filing a habeas corpus petition in federal court. Additionally, the Act established a statute of limitation whereby both federal and state inmates have one year from the time their convictions become final (after direct appeals of their convictions and/or sentences are exhausted) to file a federal habeas petition. Successive petitions must be approved by a panel of the applicable federal court of appeals, which reviews petitions to ensure they are limited to cases that present newly discovered evidence that would have undermined the jury's verdict, that involve new constitutional rights retroactively applied by the U.S. Supreme Court, or in which the previous request for habeas corpus was not fully considered by the relevant court.

243. Some concern has been expressed over the enactment of the 1996 Prison Litigation Reform Act, Pub. L. 104-134, as amended by Pub. L. 105-119, codified at 18 U.S.C. § 3626. Congress passed this law to establish more restrictive standards for the entry and continuation of prospective injunctive relief regarding conditions of confinement in prisons, jails, and juvenile facilities. This law was a response to the large number of frivolous or harassing prisoner suits which have drained the resources of the federal judicial system. Prisoner litigation has in recent years grown to become the single largest category of federal civil rights cases, constituting approximately 17 per cent of the federal district court civil docket and 22 per cent of federal civil appeals. The new law requires that, before an inmate can file a civil rights action in federal court, he or she must (i) exhaust all available administrative remedies, and (ii) show physical injury to receive damages for mental or emotional injury suffered while in custody. In addition, the law generally prohibits an inmate from filing a petition in forma pauperis (as an indigent without liability for court fees and costs) if the inmate has filed three or more actions in federal court that were dismissed as frivolous or malicious or for failing to state a claim upon which relief could be granted. Sanctions can be imposed on inmates who abuse the court system. Some prisoners' rights advocates have contended that the act has operated to limit the ability of individuals and non-governmental organizations to challenge cases of abuse in the courts, arguing, in particular, that the requirement that prisoners show physical injury before they can receive damages for mental and emotional injury is not fully consistent with United States obligations under the Convention against Torture. State habeas corpus and other court procedures are not limited by these federal statutes and remain available to state prisoners.

244. In addition, federal and state law provides various measures to ensure that the complainant and witnesses are protected against ill-treatment or intimidation as a consequence of filing a complaint or providing evidence in support of it, such as witness protection programmes.

245. Victims' Rights. The United States legal community is currently debating whether new legislation (or possibly an amendment to the United States Constitution) should be adopted to recognize and expand the rights of victims of crimes, particularly violent crimes, including inter alia the right to be present and to be heard at any public proceeding involving an offender's release from custody, the right to have the safety of the victim considered in determining any conditional release from custody relating to the crime.

246. The first crime victims assistance programmes were adopted some 25 years ago at the state and local level. At the federal level, the Victims of Crime Act was adopted in 1984, establishing a crime victim fund; in 1994, additional victims' rights legislation was enacted as

part of the Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, Title XXIII, 108 Stat. 2077. To date, approximately 20 states have amended their constitutions or passed legislation providing, inter alia, special rights to restitution.

247. In some circumstances, a court may impose an order of restitution as part of its sentence, requiring the convicted individual to make a payment to the victim rather than to the government. See Mandatory Victims Restitution Act of 1996, Title II, Pub. L. 104-132, 110 Stat. 1227, codified at 18 U.S.C. § 3663A(a).

248. Special protection is afforded to minor victims and witnesses under 18 U.S.C. section 3509, including protections of confidentiality, support of an adult attendant, services of a guardian ad litem, alternatives to live testimony, and issues of competency.

249. Domestic Assistance to Victims of Torture. In April 1997, the U.S. Department of Health and Human Services and United States Senator Paul D. Wellstone co-sponsored a conference entitled "Survivors of Torture: Improving Our Understanding", at which representatives from the human rights, refugee, and medical communities discussed treatment of the survivors of torture. In addition, the National Institute of Mental Health has made available $1.5 million in funding for research for survivors of torture and related trauma. Indeed, the President has requested from Congress $7.5 million for services and rehabilitation for victims of torture in his FY 2000 budget. Also, as noted above, the United States continues to lead the world in its support of the United Nations Voluntary Fund For Victims of Torture.

250. For three years, the Office of Refugee Resettlement (ORR) of the U.S. Department of Health and Human Services has been awarding funds to assist torture victims. Beginning in 1996, ORR has gradually increased support and currently funds 10 organizations at a total of $1.7 million in Denver, San Francisco, San Jose, Dallas, Boston, Minneapolis and New York City. These programmes identify torture survivors among refugee communities and help to make survivors comfortable with obtaining help.

251. The activities funded by ORR include: training refugee resettlement staff, English language teachers, volunteers and community services staff so that torture survivors can be identified and be referred to the services they need; orienting refugees to the help available from mental health services; and orienting mental health professionals to effectively serve refugees across language and cultural barriers. ORR is also continually working with a network of non-profit organizations around the country whose mission is to serve the needs of torture victims. The services needed by torture survivors are a unique combination of medical care, spiritual healing, psychological help and other social services. Some examples are: the Center for Victims of Torture in Minnesota has established a training programme for school teachers with students who are themselves victims of torture or whose families have suffered; Survivors International of San Francisco has established peer support groups and a community centre to offer survivors a path out of isolation; the International Institute of Boston is training mental health organizations throughout New England to treat torture survivors; and Solace in New York City helps survivors of torture reunite with their families and obtain services such as employment and housing.

252. Foreign Assistance to Victims of Torture. In addition, the United States Agency for International Development (USAID) is committed to assisting victims of torture throughout the world.

253. Latin America. USAID has supported Offices of the Human Rights Ombudsman in a number of countries, including Bolivia, Ecuador, Nicaragua, Guatemala and Peru. The purpose of these offices is to create a visible mechanism to deal with government-sponsored abuses of human rights. Torture is an important focus of their work.

254. USAID also supports, as an element of its regional democracy programming, the work of the Inter-American Institute for Human Rights, which supports the work of several ombudsman offices. The institute also has created a Program for the Integrated Prevention of Torture. Initially the focus was on training health professionals in the rehabilitation of torture victims. The current objective is to train prison officials, improve prison conditions, and otherwise give priority to the prevention of torture.

255. In Colombia, USAID is assisting torture victims through assistance to human rights training programmes, including training of the Human Rights Units of the Office of Prosecutor General. In Guatemala, USAID has supported work in two relevant areas. The Historical Clarification or Truth Commission received $1.5 million in FY 1997 and 1998. Another $2.7 million has been invested in treating victims of human rights abuses in the last two fiscal years. Most of this funding was managed by the International Organization for Migration (IOM), which in turn makes sub-grants to local and community groups best suited to respond to a variety of human rights abuses, including torture.

256. In Haiti, since 1994, USAID has supported the Human Rights Fund, which goes to assisting victims of human rights abuses, including political rape, beatings in custody and other forms of torture. The most recent extension of the fund through the end of August 1999 is for $2 million, some $600,000 of which is for victim assistance and treatment. This funding is directed where it can do the most good, primarily to individual physicians running their own treatment programmes and who are working to establish a countrywide network for referral and treatment. The remainder goes to prevention programmes directed at police/community relations and public human rights education. The incidence of human rights abuses in Haiti has declined in recent years, in part because of improved training of the national police.

257. In Peru, since 1994, USAID has extended assistance to victims of gross violations of human rights through an umbrella agreement with Catholic Relief Services, which in turn provides grants to local NGOs. These groups provide legal assistance to those wrongly accused of terrorism, many of whom have been tortured. Other programmes document torture cases.

258. Africa. USAID has a variety of programmes directed at torture and related forms of trauma in Africa. For example, in 1998 the agency's human rights programme in South Africa totalled $1.5 million and placed strong emphasis on victims of violence and torture. The USAID programme in Angola includes treating and rehabilitating war-traumatized children, landmine victims, and widows and former child-soldiers. USAID supports several interventions addressing the impact of this violence on children and other war victims.

259. In Liberia, the Displaced Children and Orphans Fund supports a number of programmes that assist children and youth who have been severely affected by the years of conflict in that country. The Patrick Leahy War Victims Fund supports clinics that, in addition to assisting landmine victims, also treat people who have been tortured.

260. In Sierra Leone, USAID is providing $1.3 million through UNICEF to assist children who have been separated from their families, involuntarily conscripted into military groups or otherwise severely affected by violence. Many of these children were physically or psychologically tortured.

261. In Uganda, with financing from the Displaced Children and Orphan's Fund, USAID initiated a $1.5 million programme to treat and rehabilitate demobilized child soldiers and other affected children who were recruited or impressed into insurgent armies, often by beating, torture and the rape of young girls. Many of these children and youths were forced to practice, or were witnesses to, extreme forms of cruelty.

262. Asia. In Cambodia, to address the harsh aftermath of the Khmer Rouge reign of terror, Harvard's School of Public Health's Program of Refugee Trauma has joined with the Ministry of Health in training primary care physicians to recognize and treat mental illness and trauma. Target beneficiaries are refugees, children, landmine victims and widowed women. We have supported this programme.

263. Europe/New Independent States. In Bosnia, USAID has supported programmes that provide trauma counselling and medical assistance for war victims, including those tortured by rape and other means. Implementing partners have been the International Human Rights Law Group and Delphi. Other funding to local NGOs has been provided to offer counselling to victims of torture, rape and other atrocities. Fortunately, the incidence of these crimes has greatly diminished since the signing of the Dayton Accords.

264. In Georgia, assistance is provided through the Horizontal Foundation for organizational development and training to such groups as the Committee against Torture, Organization for the Defence of Human Rights and Social Security of Prisoners, Media (medical experts), and other human rights NGOs. Also, the Liberty Institute has received funding to track human rights abuses, particularly by police.

265. Finally, in Kosovo, as USAID and may other organizations and nations begin a massive programme of humanitarian relief, we are extremely aware that many of the Kosovars have suffered rape, torture and other forms of brutality. We have supported treatment for these victims in the refugee camps and will continue to assist them as they return to their homeland.

266. In Macedonia we have supported programmes by the International Catholic Migration Committee and Medicine du Monde that include therapeutic activities for girls and women suffering from rape and other forms of trauma. In Albania, Catholic Relief Services social workers have provided trauma counselling to girls and women. At this time we are considering new proposals for services in Kosovo that will include psychosocial treatment to victims of torture and rape. Supplemental funds made available for FY 1999 under the Kosovo Economic and Social Recovery Program will be in part used for this purpose.

Article 14: Private right of redress and/or compensation

267. A person subjected to torture within the United States has a legal right to redress and an enforceable legal right to fair and adequate compensation from the alleged offender. Moreover, in some circumstances, United States law provides a potential remedy for foreign victims of torture occurring outside the United States. A victim may pursue several possible avenues of redress, depending on the specific circumstances. Medical and psychiatric treatment and rehabilitation are also available to victims of torture.

268. United States understanding. The negotiating history of the Convention indicates that article 14 requires a State party to provide a private right of action for damages only for acts of torture committed in its territory not for acts of torture which occur abroad. Article 14 was in fact adopted with express reference to the victim of an act of torture "committed in any territory under its jurisdiction". The quoted wording appears to have been deleted by mistake. To clarify the proper scope of the requirement imposed by article 14, the United States stated its "understanding" that:

> "Article 14 requires a State party to provide a private right of action for damages only for acts of torture committed in the territory under the jurisdiction of that State party."

As discussed below, federal law currently provides rights which are potentially broader than those required by article 14 with respect to obtaining redress for acts of torture occurring outside of United States territory.

A. Right to redress under article 14

269. Compensation. At the federal level, the principal avenues are administrative tort claims and civil litigation. Existing United States law establishes private rights of action for damages in several forms. Such suits could take the form of a common law tort action for assault, battery or wrongful death, a civil action for violations of federally protected civil rights, or a suit based on federal constitutional torts. Under the Equal Access to Justice Act, 28 U.S.C. § 2412, a federal court may award costs and reasonable attorney's fees and expenses to a plaintiff who prevails in a suit based on a for violation of his or her civil rights.

270. These mechanisms offer ample possibility for recovery of "adequate reparation" and generally are not constrained by limits on awardable compensation. Survivors of a victim killed by torture have under common law a right to seek compensation for the victim's "wrongful death".

271. Section 1983. The most common method by which prisoners seek redress (monetary damages as well as equitable or declaratory relief) against state and municipal officials is by means of a civil law suit for violations of fundamental rights pursuant to 42 U.S.C. section 1983 (initially enacted as section 1 of the Federal Civil Rights Act of 1871). This provision states:

> "Every person who, under colour of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

"State actions", i.e., actions by state or local officials, may give rise to a suit under section 1983. Through such a suit, an individual may seek redress for an officer's violation of his or her Fourth Amendment rights during the course of an arrest, or a guard's violation of his or her Eighth Amendment rights by the infliction of cruel or inhuman punishment. Section 1983 actions are also available to individuals who claim they have been subjected to discipline or excessive force by prison officials without due process - a violation of the prisoner's Fifth and Fourteenth Amendment rights.

272. While such suits can be filed in state courts, most are presented to the federal judiciary. The volume is substantial, approximately 58,000 cases in 1994 alone. While the statute was initially adopted to permit citizens to sue state and local government officials whose policies and practices fell below constitutional standards, it has come to be used primarily by prison and jail inmates challenging the conditions of their confinement. Typically, such cases claim that state officials have deprived prisoners of their constitutional rights, such as access to adequate medical treatment, Estelle v. Gamble, 429 U.S. 97 (1976), protection against excessive force by correctional officers, Hudson v. McMillian, 512 U.S. 995 (1992), violence by other inmates, Farmer v. Brennan, 114 U.S. 1970 (1994), or claiming denials of access to courts, law libraries and lawyers, Bounds v. Smith, 430 U.S. 817 (1977). Prisoners also frequently claim compensation for e.g. cruel and unusual punishment in violation of the Eighth Amendment (inadequate living conditions, failure to protect against inmates with AIDS, exposure to tobacco smoke), for denial of equal protection under the Fifth and Fourteenth Amendments, and for violations of due process (e.g. improprieties in the conduct of disciplinary hearings, classifications, administrative segregation).

273. Section 1983 applies to state officers who act under colour of state law. Monroe v. Pape, 365 U.S. 167 (1961). It also extends to municipalities and encompasses suits in which "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose conduct or acts may fairly be said to represent official policy". Monell v. Dept. of Social Services, 436 U.S. 651, 690-691 (1978).

274. Bivens claims. Individuals who have been subjected to excessive force or cruel or unusual punishment may bring suits against federal officials for violations of their federal constitutional rights under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

275. Other statutory tort claims. Another federal civil remedy is provided by the statutory grant of jurisdiction to sue the Federal Government for negligence or malfeasance. For example, the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 et seq., waives the sovereign immunity of the United States with respect to certain torts and gives the U.S. District Courts exclusive jurisdiction of civil actions against the United States for money damages for personal injury or loss of property caused by a negligent or wrongful act or omission of a government employee acting within the scope of his or her office or employment. This provision may be

used by federal inmates, U.S. v. Munoz, 374 U.S. 150 (1963), and may be used to sue federal law enforcement officers for intentional torts, including, inter alia, assault, battery, and false arrest. See, e.g., Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979).

276. State law. All states permit civil tort suits for negligence against state officials. See, e.g., Kansas Tort Claims Act, K.S.A. § 75-6104. Some states permit action for intentional torts against law enforcement officials. See, e.g., New Mexico Tort Claims Act, N.M Stat. Ann. 41-4-12. An increasing number of states now permit the award of damages for violations of state constitutional rights. For example, in Brown v. State of New York, 89 N.Y.2d 172, 652 N.Y.S.2d 223 (1996), the New York Court of Appeals permitted a class action on behalf of some 300 citizens (non-white males) who had been systematically stopped and examined by local police after an elderly woman had been assaulted at knife point. Because the victim could only identify her assailant as an African-American man who may have cut his hand during the attack, the police questioned every black student enrolled at the local branch of the state university system and eventually every black male in the area. Claimants argued that the police action had been racially motivated and based their claims on the equal protection provisions of the New York State Constitution, since New York has no enabling statute similar to the federal civil rights statute. In upholding their cause of action, the court stated:

> "[T]he State is appropriately held answerable for the acts of its officers and employees because it can avoid such misconduct by adequate training and supervision and avoid its repetition by discharging or disciplining negligent or incompetent employees ... A damage remedy for constitutional torts depriving individuals of their liberty interests is the most effective means of deterring police misconduct ..." Id. at 194, 196.

B. Additional rights and remedies under United States law

277. Alien Tort Claims Act. U.S. law provides statutory rights of action for civil damages for acts of torture occurring outside the United States. One statutory basis for such suits, the Alien Tort Claims Act of 1789, codified at 28 U.S.C. § 1350, represents an early effort to provide a judicial remedy to individuals whose rights had been violated under international law. The Act provides that "[the] district courts shall have original jurisdiction in any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".

278. The Act was successfully invoked only twice over the first two centuries of its existence. Then, in 1980, the Second Circuit Court of Appeals handed down the pivotal decision, Filartiga v. Pena-Irala, 630 F.2d 774 (2d Cir. 1980). This decision allowed a Paraguayan citizen to sue a former Paraguayan official in federal court for torture of the plaintiff's son in Paraguay. The Second Circuit held that official torture violated the law of nations and gave rise to an actionable claim under the Act. Since that decision was rendered, several other cases have explored the scope of the Act. Human rights lawyers now regularly invoke the Act in litigating international human rights principles in United States courts.

279. Only aliens (i.e., non-U.S. citizens) may sue under the Alien Tort Claims Act. The jurisdiction of the district courts to hear claims under the Act is further limited by the

constitutional requirement that the court obtain proper personal jurisdiction over the defendant i.e., the perpetrator of the violation must be present within the territorial jurisdiction of the court or must otherwise be subject to the court's jurisdiction

280. Illustrative of recent cases involving extraterritorial acts of abuse are those brought against the self-proclaimed president of Bosnia-Herzegovina, Kadic v. Karazdic, 70 F.3d 232 (2d Cir. 1995) and against the estate of the former President of the Philippines, In Re Estate of Ferdinand E. Marcos, 25 F.3d 1467 (9th Cir. 1994).

281. Torture Victims Protection Act. The remedies available under the Alien Tort Claims Act have recently been supplemented by the 1992 Torture Victims Protection Act, Pub. L. 105-256, 12 March 1992, 106 Stat. 73 (28 U.S.C. § 1350 note). While the Alien Tort Claims Act only provides a remedy to foreign nationals, the 1992 Torture Victims Protection Act allows both foreign nationals and United States citizens to claim damages against any individual who engages in torture or extrajudicial killing under "actual or apparent authority, or under colour of law of any foreign nation". The two statutes also differ in that the latter only allows suits for redress for torture or extrajudicial killings perpetrated by officials of foreign governments. While only aliens may sue under the Alien Tort Claims Act, that act does not expressly require that the defendant be either an official or foreign.

282. In some cases, the Federal Government has adopted statutory schemes of compensation for past wrongs to broad categories of individuals who do not have individual causes of action, even where the circumstances did not rise to the level of torture within the scope of the Convention. For example, under section 105 of the Civil Liberties Act of 1988, 50 U.S.C. App. § 1989b-4, the United States has provided redress to United States citizens and permanent resident aliens of Japanese ancestry who were forcibly evacuated, relocated, and interned by the United States Government during World War II.

283. Additional support for rehabilitation and treatment for victims of torture has been provided through passage into law of the Torture Victims Relief Act of 1998 (discussed above), which authorizes various forms of assistance for victims of torture in the United States and abroad.

284. Treatment and rehabilitation. In addition to monetary compensation, states should of course take steps to make available other forms of remedial benefits to victims of torture, including medical and psychiatric treatment.

285. The United States has long been a haven for victims of persecution in foreign lands. Indeed, many recent arrivals are torture victims. Some estimates place the number of such refugees and asylees now living in the United States at between 200,000 and 400,000. Various private facilities now exist in the United States for the treatment of victims of torture. The Center for Victims of Torture in Minneapolis, Minnesota, established in 1985, is the nation's pre-eminent comprehensive torture treatment centre. Other facilities also exist, including the Marjorie Kovler Center for the Treatment of Survivors of Torture in Chicago, Illinois; Survivors International in San Francisco, California; and other centres in Boston, Massachusetts, Los Angeles, California, New York, New York, and Tucson, Arizona. In addition, a number of academic medical institutions (e.g., the Harvard School of Public Health) are conducting clinical

research in this field. Other non-governmental organizations are also active in this field, including OMCT/SOS-Torture, Human Rights Watch, the International Human Rights Law Group, the Lawyers Committee for Human Rights, Amnesty International USA, and Physicians for Human Rights.

286. As indicated above, as of July 1999, the United States has contributed over $12.6 million to the United Nations Voluntary Fund for the Victims of Torture, and has been authorized by Congress to contribute an additional $3 million to the Fund in FY 2000.

Article 15: Coerced Statements

287. Current United States law contains stringent rules regarding the exclusion of coerced statements and the inadmissibility of illegally obtained evidence in criminal trials. These rules are stricter than article 15 of the Convention requires. In practice, they function as a strong disincentive to abusive treatment by law enforcement officials during interrogations.

288. Constitutional privilege. The Fifth Amendment to the United States Constitution provides that no one can be compelled in a criminal case to be a witness against him or herself. The Fifth Amendment protection applies only when the witness can cite a reasonable fear of criminal prosecution. Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 480 (1972). The Fifth Amendment also permits an individual to refuse to answer official questions put to him or her in any other proceeding, either civil or criminal, formal or informal, where the answers might be incriminating in future criminal proceedings. Baxter v. Palmigiano, 425 U.S. 308, 316 (1976). However, concern with foreign prosecution is beyond the scope of the Self-incrimination Clause of the Fifth Amendment. United States v. Balsys, 524 U.S. 666, 118 S.Ct. 2218 (1998).

289. The Fifth Amendment has been interpreted by the U.S. Supreme Court to require the provision of warnings to persons in custody, including their rights to remain silent and to have an attorney, and that statements they might make can be used against them in court. Miranda v. Arizona, 384 U.S. 436 (1966). Since 1964, this privilege has been applicable to the states as well as to the Federal Government. Malloy v. Hogan, 378 U.S. 1 (1964).

290. In all states, the same or a similar privilege (e.g. no person may be compelled "to give evidence against himself") is also recognized as a matter of state constitutional law in some states, and the privilege is re-iterated in statutes and court rules. Some states, such as Connecticut, Florida and Oregon, have independently established "Miranda" rules on the basis of state constitutional law. The Supreme Court of Wyoming has recognized a state constitutional right to silence at all times (before, during and after arrest as well as before the "Miranda" warnings have been given); see Totolito v. State, 901 P.2d 387 (WY 1995).

291. Exclusionary rule. If a criminal defendant's statement is obtained by methods which constitute coercion, the trial court must exclude the statement to prevent a violation of the Fifth Amendment. Hence, a statement made under coercion as the result of torture likely will be deemed inadmissible as evidence in a criminal proceeding, unless it is used against a person accused of torture, in which case it may be admissible only for limited purposes (e.g., as evidence that the statement was made, but not for the statement's truth). The specific legal

grounds for exclusion may vary depending on the facts of the given case. In a criminal proceeding, an incriminating statement by the defendant may be excluded as an involuntary confession, as illegally obtained evidence, or as a violation of his constitutional rights.

292. A confession given during custodial law enforcement interrogation is subject to specific, indeed rigid, self-incrimination protections under Miranda v. Arizona, 384 U.S. 436 (1966), which has come to dominate the law of exclusion over the past 30 years. Miranda requires adequate warnings to protect constitutional rights; particularly, notification of the right to remain silent, that statements by the suspect can and will be used against him or her in court, and of the right to consult a lawyer and to have the lawyer present during interrogation; if he or she cannot afford one, a lawyer can be appointed prior to questioning. The Miranda rule ordinarily requires the exclusion of a statement taken in violation of its precepts even when no violation of the Fifth Amendment is proven.

293. These rights are, of course, subject to the suspect's "voluntary" and "intelligent" waiver; however, a confession obtained in violation of these requirements may, under the Supreme Court's Miranda jurisprudence, be excluded from evidence even if the confession could be deemed "voluntary". Much litigation has taken place over what constitutes custodial interrogation, but it has been held to include words or acts that the police should know are reasonably likely to elicit a confession or incriminating response from the suspect.

294. A statement coerced by torture may also be excludable as an involuntary out-of-court confession. Voluntariness has long been a constitutional prerequisite to the admissibility of confessions, applicable to the federal and state governments under the Fifth and Fourteenth Amendments respectively. See Hopt v. Utah, 110 U.S. 574 (1884); Brown v. Mississippi, 297 U.S. 278 (1936) (a state court conviction resting on a confession extorted by brutality and violence violates the accused's right to due process guaranteed under the Fourteenth Amendment). This rule is also rooted in the Fifth Amendment, and it applies whether or not formal criminal charges have been filed.

295. Illegal search and seizure. Finally, a coerced statement may be held inadmissible because it was obtained improperly or illegally. The basis for this rule lies in the Fourth Amendment's prohibition of unreasonable searches and seizures and its requirement of due process. Evidence obtained in violation of the Fourth Amendment ordinarily must be excluded from the prosecution's case. This rule, established with respect to the Federal Government in Weeks v. United States, 232 U.S. 383 (1914), was made applicable to the states in Wolf v. Colorado, 338 U.S. 25 (1949). In Mapp v. Ohio, 367 U.S. 643 (1961), it was held to be an essential part of the Fifth as well as Fourth Amendment protections.

296. One of the best known examples of the exclusionary rule in operation is the U.S. Supreme Court's decision in Rochin v. California, 342 U.S. 165 (1952), in which the Court prohibited use of evidence obtained in manner which "shocks the conscience". In Rochin, use of stomach pumping to obtain two swallowed morphine tablets without a warrant was held to violate the Due Process Clause. More recently, an Ohio state appellate court held that it offended the concept of due process under the state and federal constitutions for a violent suspect shackled to a hospital bed to be held down by six people while a medical technician extracted a blood sample. State v. Sisler, 114 Ohio App.3d 337, 683 N.E.2d 106 (2d Dist. Clark Co. 1995).

297. The Fourth Amendment, by virtue of the Fourteenth Amendment, applies to all 50 states of the United States and constitutes a standard below which state law may not fall. In addition, the constitutions of some two thirds of the states have substantially the same "search and seizure" prohibitions; indeed, the Fourth Amendment to the United States Constitution was modelled after article 14 of the Massachusetts Constitution of 1780. In some states, constitutional protections of "privacy" may serve the same purpose as the Fourth Amendment or even offer broader protection. See, e.g., Alaska Const. art. 1, § 22; Calif. Const. art 1, § 13; Mont. Const. art 2, § 10. As indicated elsewhere, some states have exclusionary rules based on state constitutional and statutory law, see Duncan v. State, 278 Ala. 145, 176 So.2d 849 (1965), Dolliver v. State, 598 N.E.2d 525 (Ind. 1992), while others do not have their own rule and therefore must follow the federal constitutional standard, see State v. Greer, 114 Ohio App. 3d 299, 683 N.E.2d 82 (1996).

298. Confessional statements may also be deemed inadmissible for other reasons, for example when the custodians have failed to comply with statutory requirements for prompt presentation of arrested persons before magistrates, e.g., under the so-called McNabb-Mallory rule, or as the "poisoned fruit" of an illegal arrest or detention; see Wong Sun v. United States, 371 U.S. 471 (1963).

299. In their operation, these rules against admissibility of illegally obtained evidence and involuntary confessions are stricter than required under the Convention. They are not absolute, however, and in some circumstances the Government may compel a witness to testify, but will be precluded from using the compelled testimony against the witness. The federal immunity statute, 18 U.S.C. §§ 6001 et seq., addresses the accommodation between the right of the Government to compel testimony in court under certain exigent circumstances with immunity from use in a prosecution and the individual's right to remain silent. State statutes also provide for various types of testimonial or transactional immunity.

300. Where a statement made under torture is invoked against a third party, a question could arise as to whether the third party has standing to raise the illegality of the means of obtaining such evidence as a ground for exclusion. As a practical matter, considerations of due process and reliability, as well as the hearsay rule, would generally operate to exclude such statements. See Consideration of Reports Submitted by States Parties under article 40 of the Covenant, Initial Report of the United States of America, United Nations Doc. CCPR/C/81/Add.4 (1994) (Right of Confrontation).

Article 16: Other cruel, inhuman or degrading treatment or punishment

301. Article 16 embodies an important undertaking by which States parties to the Convention must act to prevent cruel, inhuman and degrading treatment or punishment not amounting to torture within territories under their jurisdiction. The particular steps required by this article are those specified in articles 10-13: appropriate training of law enforcement and other personnel involved in the custody, interrogation or treatment of persons arrested, detained or imprisoned; review of interrogation and detention rules and practices; investigation by State authorities; availability of the right to bring a complaint for investigation.

302. United States reservation. The United States conditioned its ratification upon the following reservation:

> [T]he United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment", only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

303. The scope and motivation of this reservation have been the source of some question. In the view of the United States, it was necessary to limit United States undertakings under this article primarily because the meaning of the term "degrading treatment" is at best vague and ambiguous. One specific concern involved the possibly extensive reach of governmental obligations under this article, especially in light of the constraints imposed by the federal character of the United States system and the limitations of the "state action" doctrine.

304. Federal Constitution. As indicated above, the federal Constitution has been amended and interpreted to provide extensive protections against cruel and inhuman punishment, and these protections reach much of the conduct and practice to which article 16 is in fact addressed.

305. State constitutions. The constitutions of almost 30 of the constituent states use language identical to that of the federal Constitution; 21 say "cruel or unusual" as compared to 6 which say only "cruel"; Maryland uses both. State constitutional prohibitions against cruel and/or unusual punishment have been held to extend to "greatly disproportionate" sentences as well as to those exceeding any legitimate penal aim. Workman v. Commonwealth, 429 S.W. 2d 374 (KY 1968), Steeno v. State, 85 Wisc.2d 663, 271 N.W.2d 396 (Wisc. 1978) and to conditions at a county prison, Commonwealth ex. rel. Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (Penna. 1971).

Among the specific issues raised in the context of article 16 are the following:

306. Police brutality. The excessive use of force by law enforcement officers violates the United States Constitution as well as federal law. It also violates the laws of the state in which the incident occurs. Both federal and state laws provide victims of such abuses several methods for seeking compensation and rehabilitation as well as grounds for punishing those who have used excessive force.

307. Although the Eighth Amendment's protections against cruel and unusual punishment apply only to those subject to "punishment" within the Amendment's meaning, the Fourth Amendment protects all individuals against unreasonable intrusions upon their bodily integrity and security of person. In Graham v. Connor, 490 U.S. 386 (1989), the U.S. Supreme Court held that an arrestee's claims that arresting officers used excessive force resulting in injury or death implicated the Fourth Amendment: "all claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analysed under the Fourth Amendment and its 'reasonableness'

standard, rather than under a 'substantive due process' standard". Id. at 395. Excessive force in effecting an arrest may violate the individual's Fourth Amendment right even where probable cause for arrest exists. Tennessee v. Garner, 471 U.S. 1 (1985).

308. The civil rights statutes also provide a basis for challenging alleged police brutality. For instance, in Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994), cert. denied, 513 U.S. 1148 (1995), an arrestee sued the City of Los Angeles, its police chief, and various police officers under section 1983, alleging a violation of his constitutional rights when he was injured by a police dog during an arrest. The Federal District Court granted the defendant summary judgement, relieving the officers and the city of liability and accountability; however, the decision was overturned on appeal, and the city eventually settled the case for $100,000.

309. Prison conditions. Although a significant percentage of the nation's correctional facilities are relatively new, many are not, and in recent years virtually all have been subject to the pressures of overcrowding and the lack of adequate funding. As a result, the conditions in the nation's prisons have continued to be a matter of concern.

310. One example is the District of Columbia's Correctional Complex in Lorton, Virginia, especially its largest component, the Occoquan Medium Security Prison. Several suits have been filed by inmates in federal court regarding living conditions in its various institutional facilities, including allegations of sexual harassment and lack of proper medical care. See, e.g., Women Prisoners v. District of Columbia, 968 F.Supp. 744 (D.D.C. 1997).

311. Various non-governmental organizations undertake projects aimed at the disclosure of unsafe, unhealthy, sub-standard conditions in the nation's prisons and jails. For example, the American Civil Liberty Union's Prison Project undertakes prison litigation as a means of challenging prison conditions and seeking relief for inmates.

312. Other non-governmental groups have cited conditions in the McConnell, Michael and Robertson units in Texas; the Dade County Jail in Miami, FL; Onondage County Public Safety Building in Syracuse, NY, and facilities in the Georgia Women's Correctional Institution. The Civil Rights Division of the U.S. Department of Justice conducted an investigation of conditions at the Syracuse, NY facility and issued a letter to the county finding constitutional violations in October 1994. In April 1997 the investigation was closed after the county implemented the necessary reforms.

313. The U.S. Department of Justice plays a central enforcement role in protecting the rights of prisoners throughout the country. The Department may file lawsuits and obtain relief either by court order or through negotiated settlements. The Department also may investigate and issue letters of findings, which often result in the jurisdictions taking the necessary remedial measures, but which also may be followed by the Department filing a lawsuit.

314. Other recent consent decrees and settlements have dealt with a Montana State men's prison; facilities in the Territory of Guam and the Commonwealth of the Northern Mariana Islands; and jails in Maricopa County (Phoenix) and Gila County, Arizona, and Clay County and

Dooly County, Georgia. Recent letters of findings that, to date, have not led to litigation include letters addressing conditions at the Los Angeles County, California jails; the Black Hawk County, Iowa jail; and the Clark County (Reno), Nevada Detention Center.

315. Segregation and separation. As a general matter, only in limited circumstances may convicted prisoners be subjected to special security measures such as segregation or separation from the general prison population in specially constructed cells. Such measures may be employed for punitive reasons or as a means of maintaining the safety and security of inmates and staff in the institution as well as of the general public. No condition of confinement, including segregation, may violate the Eighth Amendment's proscription against cruel or unusual punishment, nor may it violate the prisoner's rights to due process and access to the courts under the Fifth and Fourteenth Amendments. Decisions to place prisoners in administrative segregation can be challenged in court by writ of habeas corpus, see Presier v. Rodriquez, 411 U.S. 475 (1973), or under section 1983, see Hech v. Humphrey, 512 U.S. 477 (1994); see also Brown v. Plaut, 131 F.3d 163 (D.C. Cir. 1997) (holding that a section 1983 action could be brought for damages arising from a decision to place an inmate in administrative segregation without due process of law).

316. All correctional systems in the United States impose codes of conduct on inmate behaviour which include provisions for imposing disciplinary sanctions when inmates violate the code. These disciplinary systems are essential to ensuring the security and good order of institutions. Inmates receive a copy of the code of conduct immediately upon their arrival. The disciplinary process is administered internally but must incorporate important constitutional requirements to guarantee that prisoners are not disciplined without due process.

317. As the U.S. Supreme Court stated in Wolff v. McDonnell, 418 U.S. 539 (1974), "though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime". In that case, the Court recognized the inmate's right to due process preceding the imposition of disciplinary measures.

318. Similarly, a U.S. District Court found that conditions in the special housing unit at California's Pelican Bay State Prison constituted cruel and unusual punishment for the mentally ill among the prison population. Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995). This case involved a class action brought by prisoners under the section 1983 to challenge their conditions of confinement. The court found a pattern of excessive force (including assaults, beatings, and confinement in outdoor cages during inclement weather) which violated the Eighth Amendment's restraint on excessive force, as well as systematic deficiencies in medical and mental health care and various violations of due process, notably in the procedures by which inmates were assigned to the special housing unit.

319. Sexual abuse of women in prison. Federal law prohibits sexual conduct between correctional staff and inmates regardless of gender. See 18 U.S.C. §§ 2241-44. Most states have similar rules. Federal Bureau of Prisons policy (set forth in Program Statement 5324.02, Sexual Abuse/Assault Prevention and Intervention Programs) is aimed at preventing sexual assault on inmates, providing for the safety and treatment needs of inmates who have been assaulted, and disciplining and prosecuting those who sexually assault inmates. As part of the 1998 Annual

Refresher Training Program, all Federal Bureau of Prison staff are required to attend a session on managing staff/inmate relationships. Staff will be trained to recognize the physical, behavioural, and emotional signs of sexual assault, to understand the referral process when a sexual assault occurs, and to have a basic understanding of sexual assault prevention and response techniques.

320. The National Institute of Corrections provides training and assistance to state and local prison and jail administrators in developing effective, humane and constitutionally correct facilities. It also funds technical assistance requests from the states in such areas as sex offender programmes and prevention/intervention strategies for sexual abuse in prisons. As part of its accreditation programme, the American Correctional Association promulgates standards regarding appropriate training, rules and regulations.

321. Despite clear and strict rules against such abuse, there are recurrent complaints by inmates and non-governmental organizations about ill-treatment of women prisoners by guards, other officials and inmates. Unfortunately, reliable statistics are not available. However, while it does not appear to be endemic, anecdotal evidence indicates a problem which continues to require consideration and action. See, e.g., Human Rights Watch, "All Too Familiar: Sexual Abuse of Women in U.S. State Prisons" (1996) (alleging that some male officers in state correctional systems have engaged in rape, sexual assault, and other types of abuse of women prisoners, including inappropriate pat-and-frisk searches, verbal harassment, and provision of inadequate health care).

322. Such allegations are routinely investigated by the U.S. Department of Justice. As indicated above, the Department's Civil Rights Division instituted litigation in 1997 against the states of Arizona and Michigan alleging that female inmates at state-run prisons were subject to unlawful invasions of privacy and sexual assault by prison guards. Such practices are also subject to litigation brought by prisoners. For example, in Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993), a successful challenge was made to the Washington State Corrections Center for Women of requiring male guards to conduct random, non-emergency, suspicionless, clothed body searches of female prisoners. Additionally, female prisoners of the District of Columbia prevailed in a class action suit which alleged that authorities violated the Eighth Amendment, inter alia, by tolerating or engaging in physical assaults, sexual harassment and invasion of bodily privacy. Women Prisoners v. District of Columbia, 968 F. Supp. 744 (D.D.C. 1997).

323. Juveniles in detention. Concern is frequently voiced about the circumstances in which minors (individuals of less than 18 years) are detained in prisons and jails throughout the country. On the whole, the correctional systems of the United States are operated in accordance with the relevant standards, and the United States adheres to the various requirements and recommendations adopted by the United Nations. Under federal law juveniles must be separated from adult offenders by sight and sound. More detailed information may be found in the 1997 report of the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention entitled "Juveniles in Federal Custody".

324. Despite a general policy and practice of segregating juvenile offenders separately from adults and according them treatment appropriate to their age and status (see article 10 (3) of the Covenant on Civil and Political Rights), in actuality these goals are not always possible to achieve because of overcrowding, under-funding, and similar practical limitations.

325. The Department of Justice has authority under several statutes to file suit when it determines that juvenile offenders are not being afforded treatment appropriate to their age and status in violation of the United States Constitution or federal laws. Lawsuits have been filed by the United States concerning juvenile facilities in Georgia, Kentucky, Puerto Rico, Essex County, New Jersey and Louisiana, and settlements have been obtained with Georgia, Kentucky, Puerto Rico, and Essex County. The U.S. Attorney-General has circulated the Georgia settlement to all State Attorneys-General as a model of appropriate practices for addressing the needs of incarcerated juvenile offenders.

326. The INS has paid particular attention to the housing of juvenile aliens. The INS attempts to ensure that all INS officers who come in contact with juveniles receive training on the special needs of juveniles. It is INS policy to place each detained juvenile in the least restrictive setting that is appropriate to the minor's age and special needs and that protects the minor's well-being and that of others. The INS places great emphasis on the need to house juveniles in state-licenced facilities that meet strict requirements to provide for their medical, educational and recreational needs.

327. Abuse of the institutionalized. Under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997e, the U.S. Department of Justice is authorized to investigate public facilities (such as prisons, jails, nursing homes, and institutions for the mentally retarded or mentally ill) in which it is believed that confined individuals are being deprived of their constitutional rights. This responsibility is carried out through the Department's Civil Rights Division, which by 1 June 1999 had initiated CRIPA actions regarding approximately 340 facilities, resulting in nearly 100 consent decrees governing conditions in about 200 facilities.

328. These investigations and consent decrees typically focus on protection from abuse and harm, provision of adequate medical and mental health services, and proper sanitary and fire-safety conditions. For example, in 1997, the Civil Rights Division entered into consent decrees with institutions in Wisconsin and Tennessee regarding those facilities' provision of proper medical treatment, use of restraints, and use of psychotropic medications on the mentally retarded. In that same year, the Division settled a lawsuit against the Montana State Prison with an agreement ensuring that vulnerable inmates are protected from predatory inmates.

329. Protection is afforded by other statutes as well. In Coleman v. Wilson, 912 F. Supp. 1282 (E.D. Cal. 1995), for example, a federal magistrate found that policies and practices of mental health care at most institutions within the California Department of Corrections were so inadequate as to violate the federal Rehabilitation Act, 29 U.S.C. § 794, as well as the Eighth Amendment.

330. Inmates with disabilities. In addition to the Rehabilitation Act, the federal Americans with Disabilities Act of 1990, codified at 42 U.S.C. § 12101, has been held to prohibit state prison facilities from discriminating against inmates with disabilities. Yeskey v. Com. Of Pa. Dept. Of Corrections, 118 F.3d 168 (3rd Cir. 1997), aff'd., Pennsylvania Department of Corrections et al. v. Yeskey, 524 U.S. 206, 118 S.Ct.1952 (1998).

331. Castration of habitual sex offenders. There has been considerable debate in the United States about the effectiveness of castration as a method of sex-related crime prevention, especially in those cases in which the antecedent offence did not involve penile penetration. In August 1996 the State of California became the first state to require either the chemical or the surgical castration of repeat child molesters prior to their release from prison. See Cal. Penal Code § 645(b). The new law, which applies to persons convicted after 1 January 1997, mandates that anyone, male or female, who has been convicted of two sexual assaults on minors, must be injected during the week prior to release on parole with a drug to reduce sexual drive if the individual does not choose to be surgically castrated. Montana and Georgia have adopted similar legislation, and proposed bills are or have been under consideration in at least 10 other states, including Florida, Massachusetts, Missouri, Texas and Wisconsin.

332. Coerced castration has been held unlawful by the state supreme courts in Michigan and Montana, and these proposals have been criticized as a violation of the Eighth Amendment as well as of due process. Use of sex-drive suppressing drugs has been defended as a safe and effective treatment for habitual offenders, in part on the basis of the experience of various European countries.

333. Other state laws allow state authorities to impose civil commitment on sexually violent predators following incarceration if the offenders are found to be a danger to the community, even after they have completed their prison sentences. See Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997).

334. Prisoners on chain gangs. In May 1995 the State of Alabama reintroduced the practice of "chain gang" labour for felony convicts in the state correctional system (the term derives from the use of shackles attached to the prisoners legs and wrist to prevent escape). The practice was also instituted the following year for women in Maricopa County, Arizona, where teams of prisoners work along busy streets pulling weeds and performing similar tasks under armed guard. It has also been in use in Florida, Iowa, and Wisconsin. See Amnesty International, "Florida Reintroduces Chain Gangs" (January 1996).

335. Non-consensual medical and scientific testing. Informed consent is the touchstone of the United States Government's approach to medical and scientific testing. In 1991 the Government adopted a formal policy for the protection of human subjects participating in research conducted, supported or regulated by any of the 17 federal agencies to which it applies. This policy is set out at 45 C.F.R. Part 46. Research covered by these regulations must be reviewed by an Institutional Review Board composed of experts knowledgeable about the research and at least one member who is not a scientist and one member who is not affiliated with the institution in question. The Institutional Review Board must review and approve any proposed research and informed consent documents. The National Bioethics Advisory Commission is currently studying the effectiveness of these protections, as well as other relevant topics, such as research involving individuals with diminished capacity.

336. Consistent with the provisions of 45 C.F.R. Part 46, the Department of Justice has promulgated regulations regarding the Protection of Human Subjects. See 28 C.F.R Part 46. In compliance with these regulations, the Federal Bureau of Prisons has issued its own regulations regarding research. See 28 C.F.R. Part 512.

337. Nonetheless, there have been allegations of abuses of informed consent requirements, most of which predate the adoption of the Federal Policy for the Protection of Human Subjects.

338. Concerns have been voiced regarding atmospheric nuclear weapons testing by the United States Government during the period 1951 to 1962 in Nevada. Recently released details of these testing programmes have heightened concerns that soldiers and civilians were exposed to large amounts of radioactivity. Military personnel can seek compensation under Veterans Affairs disability proceedings or under the federal Radiation Exposure Compensation Act of 1990, 42 U.S.C. § 2210.

339. Special concerns have been voiced about the exposure of millions of children to harmful doses of radioactive iodine, especially in contaminated milk, during the period of atmospheric testing in the 1950s and 1960s. However, surveys by the National Cancer Institute (initially ordered by the United States Congress in 1982) have failed to establish a statistical link between the tests and increased risk of thyroid cancer, which remains a relatively rare disease.

340. Concerns have been raised concerning other government-sponsored projects involving research on human subjects conducted from 1944 to 1974, which were documented and reviewed by the U.S. Advisory Committee on Human Radiation Experiments and described in its 1995 Final Report, including experiments such as injecting 18 people with radioactive plutonium without their informed consent. The Committee identified several thousand human radiation experiments, the majority of which involved only radioactive "tracers" similar to those used in contemporary research. Some did, however, carry potential lifetime risks. The Committee determined that the Government did not generally take effective measures to implement its own precautionary regulations and policies, and it recommended measures to ensure appropriate safeguards in future projects. This review resulted in payments to the subjects by the United States Government of some $4.8 million.

341. In the "Tuskegee syphilis study", 400 black males with syphilis were deliberately not treated by physicians so that scientists could study the progress of the disease. This study ended in 1972, three months after it became the focus of national attention through the press. The President has apologized for this programme, and compensation has been offered to the victims.

342. Informed consent by a legally authorized representative allowing minors and individuals who are mentally incapacitated to participate in research on mental illness and paediatric disease has been a particular focus of debate in the medical and scientific communities. In December 1996 a New York State appellate court invalidated state regulations allowing surrogates to give consent to certain experiments on behalf of minor children and those incapable of giving consent at state mental health facilities. The court decided that the New York State Office of Mental Health did not have authority to promulgate regulations governing human subjects research and said that the regulations violated due process guarantees under the federal and state constitutions as well as common law privacy rights. See T.D. v. New York State Office of Mental Health, 228 A.D.2d 95 (N.Y. App. Div. 1st Dept.). On 22 December 1997, the

New York Court of Appeals found that the Appellate Division had issued an inappropriate advisory opinion regarding the constitutionality of the regulations. T.D. v. New York State Office of Mental Health, No. 252, slip op. at 2 (N.Y. 1997). State authorities have formed an advisory committee to assist in promulgating new regulations.

343. In some recent instances, informed consent procedures were followed but were later judged inadequate and subject to correction in regard to the level of Institutional Review Board scrutiny given to the research project or the information contained in the informed consent. For example, the Neuropsychiatric Institute of the University of California at Los Angeles conducted studies from 1988 through 1994 in which schizophrenia patients were withdrawn from their medications without fully informed consent. In 1994 the University of Pittsburgh National Surgical Adjuvant Breast and Bowel Project conducted research in which individuals at risk of developing breast cancer received tamoxifen without full information regarding the risks associated with that agent.

344. Illegal immigrants in custody. In recent years, the number of intending illegal immigrants into the United States has increased markedly. When apprehended, those attempting or achieving illegal entry are typically detained pending the adjudication of their cases according to the Immigration and Nationality Act. The INS has focused significant attention on the conditions under which aliens awaiting the completion of immigration proceedings are detained. Over the years the INS has worked on developing a comprehensive set of detention standards covering most of the issues identified for detainees housed in INS facilities. It has also focused attention on the conditions of confinement of its detainees housed in state and local facilities. The INS conducts regular inspections of such facilities and attempts to ensure that they meet or exceed the standards contained in its jail inspection programme, which are themselves undergoing review. INS officials have also engaged in discussions with representatives of the Department of Justice, the American Bar Association and state and local officials in an effort to inform them about its ongoing efforts to review and improve detention conditions.

345. Recent changes in the law, including the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Pub. L. No. 104–208, 110 Stat. 3546 (30 September 1996), require the detention of more categories of aliens, including certain asylum-seekers and aliens with criminal records, pending the adjudication of their cases. As a result, the number of detainees has increased significantly; at the end of 1998 approximately 16,300 were being held in custody.

346. Commensurately, the number of complaints about the treatment of these detainees and the conditions in which they are held have also increased. Many detainees remain in the custody of the INS and are housed in such major federal detention centres as the Krome Service Processing Center in Florida. Because of overcrowding in these federal facilities, however, INS has entered into arrangements by which many are held in state, county and local jails, as well as in privately-operated centres under contractual arrangements with such entities as the Corrections Corporation of America (CCA).

347. Complaints have included allegations of overcrowding, sub-standard and unsafe facilities, lack of adequate medical and dental care, misclassification of asylum-seekers as maximum security prisoners, lack of adequate access to legal counsel and legal materials, and lack of appropriate recreational programmes.

348. For example, on 18-19 June 1995, a riot by INS detainees occurred in a privately run detention facility in Elizabeth, New Jersey after months of complaints about physical and mental abuse, lack of access to telephones, infestation by insects, poor food and other inadequate conditions. Civil litigation by the detainees against the INS and its contractor (ESMOR/Correctional Services Company) is pending in the U.S. District Court in Newark, NJ (Civ. No. 97-3093), in which the complaint is based substantially upon alleged violations of customary international law. Criminal charges were independently brought against the private prison company.

349. Capital punishment. The issue of capital punishment remains a matter of great importance and vigorous public debate in the United States. A majority of the people in a majority of the states, and of the country as a whole, have chosen through their elected representatives to provide the possibility of capital punishment for the most serious crimes.

350. United States reservation. Capital punishment is currently permitted in 38 states and by the Federal Government; 12 states and the District of Columbia do not use the death penalty. In those states which permit capital punishment, it may only be imposed for the most serious crimes (essentially aggravated, intentional homicide), subject to stringent procedures intended to protect the defendant's due process rights (including a separate sentencing hearing at which both aggravating and mitigating circumstances must be weighed).

351. In part because critics of capital punishment consider the sanction to be inherently cruel and inhuman, and because many advocates of abolition consider certain methods of execution to be similarly impermissible, the United States conditioned its ratification of the Convention on the reservation noted in annex I, limiting U.S. obligations under article 16 to the prohibitions against cruel, inhuman or degrading treatment or punishment in the Fifth, Eighth and/or Fourteenth Amendments. This reservation has the intended effect of leaving the important question of capital punishment to the domestic political, legislative, and judicial processes. That the Covenant's prohibition of cruel, inhuman or degrading treatment or punishment itself does not (and was not intended to) prohibit the death penalty is reflected in the existence of the Second Optional Protocol to the ICCPR, which states that "[n]o one within the jurisdiction of a State Party to the [Protocol] shall be executed".

352. United States understanding. United States law provides stringent safeguards in capital cases, including special procedures regarding sentencing. Among the issues which are frequently argued before state as well as federal courts are: racial discrimination in the application of the death penalty, inadequate counsel and inability to adduce exculpatory evidence, and impermissibly long periods of confinement on death row. In order to place clearly on the record the United States Government's view concerning the relevance of international law

in general, and this Convention in particular, to these issues, the United States included in its instrument of ratification the following "understanding" regarding capital punishment:

> The United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

353. Because of these provisos, the United States considers the issue of capital punishment to be outside of the scope of its reporting obligations under this Convention. Nonetheless, for the information of the Committee, we have included a brief summary of relevant aspects in annex III.